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IN THE

Supreme Court of the United States

WENDELL J. CALEY

defendant-petitioner

vs

RYAN DISTRIBUTING CORPORATION

plaintiff-respondent

No. 1161

October Term

1944

Petition for Writ of Certiorari

and

Petitioner's Brief

in support thereof

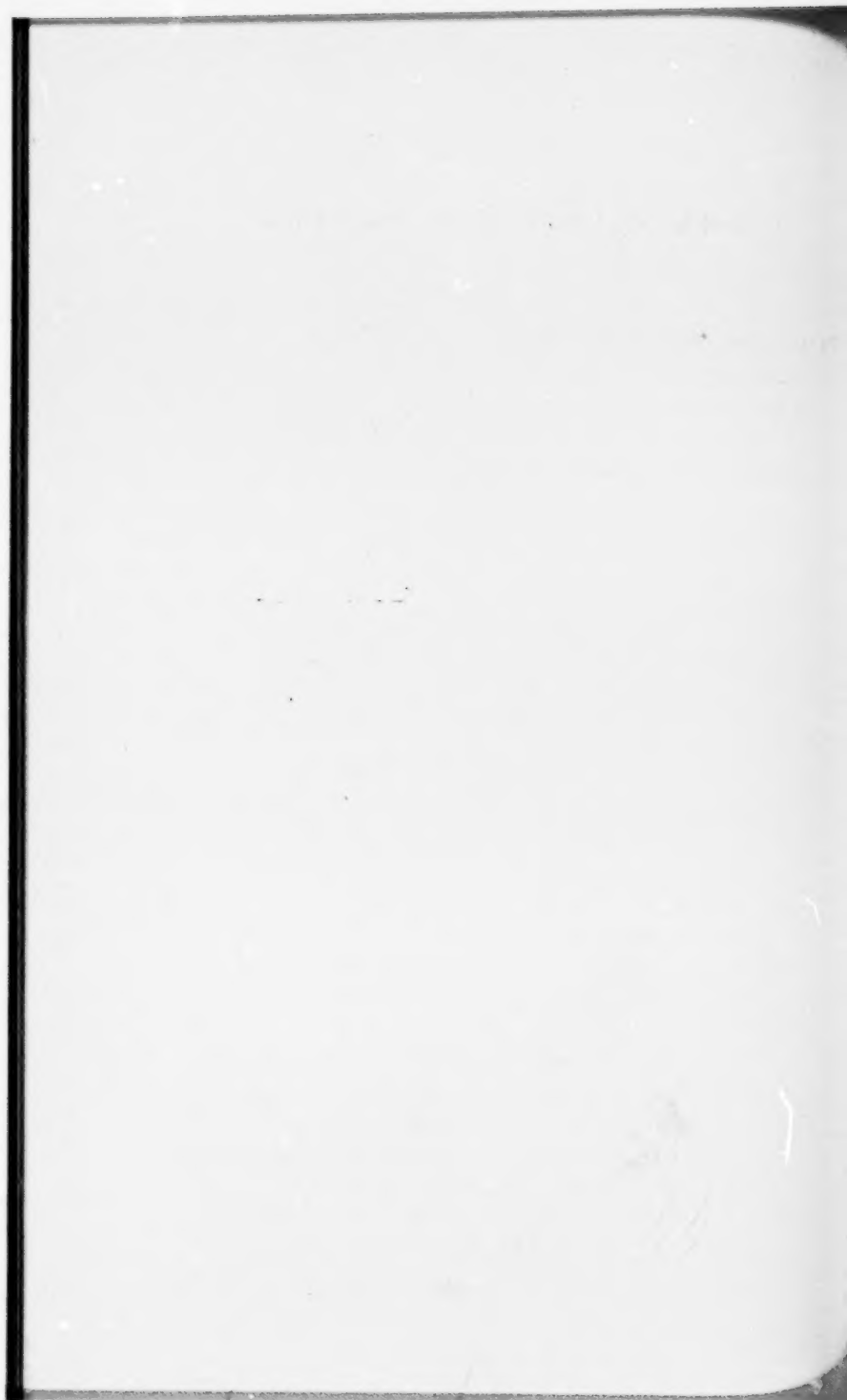
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Petition for Writ of Certiorari	(pages 1 to 19)
and	.
Brief in Support Thereof	(pages 23 to 67)



PETITION FOR WRIT OF CERTIORARI

To the Honorable, The Chief Justice and Associate Justices
of the Supreme Court of the United States:

Summary:

Your petitioner, Wendell J. Caley, prays for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit, to review a decision and judgment of that Court sustaining the entry of *judgment non obstante veredicto* on an issue of fact,

in the face of a strong *legal presumption*¹, and uncontradicted testimony of acknowledged probative value (R. 58, lines 13-18) *supporting the verdict*,
and

in the absence of a scintilla of any relevant *new*² evidence against the verdict,

thereby re-examining a "fact tried by a jury" and setting aside the verdict based thereon, in a suit at common law;— which verdict was based upon the finding that petitioner had, in fact, exercised the inventive faculties in bringing into being the *admittedly new and useful* (R. 37-38) improvement patented to him, and thereby depriving petitioner of the benefit of "the right of trial by jury" and the immunity from re-examination of a "fact tried by a jury . . . otherwise . . . than according to the rules of the common law" guaranteed by the Seventh Amendment of the Constitution of the United States.

1) a legal presumption, flowing from a prior quasi-judicial determination of the same fact-question by an administrative branch of the Federal Government: *Mumm vs Decker*, 303 U. S. 168, 171; 81 L. Ed. 983, 985 and *Radio Corporation of America vs Radio Engineering Laboratories, Inc.*, 203 U. S. 1; 79 L. Ed. 163 and *Park-In Theatres Inc. vs Rogers*, 130 Fed (2d) 745, 747 (CCA 9); *Abbott vs Coe*, 109 Fed (2d) 449, 451 (App. D. C.), and *Mississippi Valley Barge Line Co. vs United States*, 292 U. S. 282, 286, 287; 78 L. Ed. 1260, 1264, 1265;—which prior quasi-judicial determination of the fact-question was favorable to petitioner and in accord with the jury's fact-finding implied in its verdict

2) that is, no relevant evidence other than what had been the basis of the prior quasi-judicial fact-finding in accord with and favorable to the verdict

Short Statement of Matter Involved

The trial was to determine respondent's liability to petitioner, for respondent's confessed (R. 16-17) infringement of petitioner's patent-in-suit.

Respondent's sole defense (R. 22) to its *prima facie* liability for such confessed infringement was that the patent-in-suit was invalid for "lack of invention over the prior-art" or that petitioner had not, in fact, exercised the inventive faculties in bringing into being the *admittedly new and useful* (R. 37-38) improvement patented to him.

Against the strong legal presumption (flowing from the prior quasi-judicial determination of this fact-question by an administrative branch of the Federal Government) that petitioner had, in fact, exercised the inventive faculties in bringing into being the *admittedly new and useful* (R. 37-38) construction patented to him³, respondent offered *nothing* more than

- a: a group of prior-art patents in the same art, the most pertinent of which the Patent Office *had considered in connection with the granting of the patent-in-suit*, and which respondent admitted (R. 22), and the trial Judge ruled, did *not* disclose the same construction as that of the patent-in-suit, and in respect to which the trial Judge had ruled that the device of the patent-in-suit was *both new and useful* (R. 26, 30, Q26, 37-38), *plus*
- b: a group of "prior-art" patents taken from *other* arts, which patents the trial Judge said "are not anywhere near the patent" in suit (R. 24-26) and as to which the trial Judge said that petitioner's expert witness need spend no time on them, in rebuttal, because they were, in the trial Judge's *then* view, "a waste of time" (R. 26), and as to which the trial Judge, in effect, refused to receive rebuttal testimony tendered by petitioner, on the ground that these prior patents from *other* arts were too remote and of too little (if any) probative value, to warrant rebuttal thereof.

3) see footnote 1 *supra* (on page 1)

Respondent relied upon these two groups of prior patents without offering a single witness or a word of oral testimony or any other evidence other than a copy of the so-called "file-wrapper" of the patent-in-suit.

Hence, respondent did not offer a scintilla of evidence against the jury's verdict, other than the same evidence upon which the prior quasi-judicial fact-finding of the Patent Office had been against respondent's sole defense at bar (plus a grist of other "prior-art" patents so remote and irrelevant that the trial Judge, after having them explained to him by respondent's counsel, said that they were "not anywhere near the patent" in suit, and "a waste of time" to consider: R. 26).

Confirmatory of the presumptive³ presence of invention, there was uncontradicted testimony, adduced on behalf of petitioner, of the prior-marketing (1931-1933) of the "prior-art" device with unfavorable results (R. 34, RDQ28; R. 14, XQ23; R. 15, XQ24; R. 15-16, RDQ28-31); the practical superiority of the construction of the patent-in-suit (in contrast to the "prior-art" construction) both in regard to ease of operation and in regard to end-results (R. 14-15, XQ23-24, RDQ28-31; R. 21, RDQ26); the wide public-acceptance of the device of the patent-in-suit (R. 34); its deliberate copying by respondent (R. 9, 16-17, 23); respondent's seeking an improvement patent thereon (Caley's Exhibit 9); economies of production flowing from the construction of the device of the patent-in-suit which were passed on to the ultimate consumer (R. 34, RDQ29; R. 20-21, Q8-10); expert testimony that it was *not obvious to those skilled in the art* (R. 30, Q27, also CCA at R. 58, lines 13-18); and the testimony of respondent's *alter ego*, L. L. Ryan⁴, that she preferred the construction of the patent-in-suit (to those of the expired "prior-art") because

³) see footnote 1, *supra* (on page 1)

⁴) formerly employed by petitioner to demonstrate and sell the device of the patent-in-suit, and who had previous extensive experience with many other devices in this field

it worked better and because she "*thought it was the best*" (R. 23, RXQ80).

The legal presumption³ of presence of invention, and all the aforesaid uncontradicted testimony confirmatory of such presumption, *supported the jury's verdict*.

Indeed, the trial Judge's own appraisal of the evidence, during the trial (R. 24-26; R. 30 Q26), and his charge to the jury (R. 37-38, 40, last paragraph) are in harmony with the verdict reached by the jury.

The *judgment non obstante veredicto* and the decision and judgment of the Circuit Court of Appeals for the Third Circuit sustaining it, were each based solely upon the disclosures of these same two groups of "prior-art" patents;—the decision and judgment of the Circuit Court of Appeals for the Third Circuit (the review of which is hereby sought) being based specifically and exclusively upon

a: the expired Godward patent taken from the first group;—the disclosure of which petitioner had, at the outset, called to the attention of the Patent Office (and to the public, upon the issuance of his patent) by *Figures 8 and 9 of the drawings of the patent-in-suit* marked "Prior-Art" and by the accompanying parts of his patent-specification relating thereto,

and

b: the expired Anderton patent, taken from the second group;—the disclosure of which the trial Judge had appraised as "not anywhere near the patent" in suit and "a waste of time" to consider (R. 25-26), and as to which the trial Judge, in effect, refused to receive testimony tendered by petitioner in rebuttal thereof, on the ground that Anderton was so irrelevant or of so little probative value as not to warrant rebuttal testimony.

3) see footnote 1, *supra* (page 1)

In the case at bar, it *affirmatively* appears that "reasonable men could differ" on the conclusions to be drawn from the evidence,

1) because a quasi-judicial administrative tribunal of the Federal Government (i. e., the Patent Office), having considered the same "prior-art" which the trial Judge regarded most pertinent (i. e., Godward and Fraser), reached a conclusion

contrary to that reached by the trial Judge (when he entered judgment notwithstanding the verdict) and

in accord with the conclusion reached by the jury (in rendering its verdict), and

2) because the uncontradicted expert testimony is that petitioner's admittedly new and useful construction of the patent-in-suit would not be obvious to those skilled in the art, even if they had before them all the "prior-art" patents relied upon by respondent, and

3) because respondent, with many years of prior practical experience in the field, and having freely available to it the devices of the "prior-art"⁵ preferred the device of the patent-in-suit (against those of the expired "prior-art" freely available to all) because it was more effective in actual use and because respondent "thought it was the best" (R. 23, RXQ80), and

5) the two patents relied upon by the Circuit Court of Appeals, namely Godward and Anderton, having expired 23 years and 24 years, respectively, *before* respondent's confessed infringement here involved, and the hair-curler of the Godward patent having been marketed to a substantial extent, but with many unfavorable practical results, ten years prior to respondent's confessed infringement

4) because the trial Judge differed with himself as to the weight to be given to the evidence or as to the conclusions to be drawn therefrom;—

having concluded and stated during the trial ⁶ that the contents or disclosures of the group of “prior-art” patents taken from *other arts* ⁷, including, specifically, the *Anderton patent*, as well as the contents or disclosures of some of the patents from the same art ⁸ (namely from the hair-curler art ⁸) were “not anywhere near the patent” in suit and a “waste of time” to consider and, for that reason, did not warrant any testimony in rebuttal thereof (and having, thereafter, at the conclusion of all the evidence, also denied respondent’s motion for directed verdict based solely upon the contents of respondent’s aforesaid two groups of “prior-art” patents), and

having reached the diametrically opposite (and incompatible) conclusion ⁹, 40 days after the verdict, that the *Anderton patent* was sufficient, so completely to tip the scales of the evidence,

(including petitioner’s several branches of evidence plus a strong legal presumption, all admittedly tending to support the jury’s verdict),

as to require the setting aside of the jury’s verdict and the entry of a judgment notwithstanding the verdict.

6) after the conclusion of respondent’s case and after *respondent’s counsel explained* to the Judge and jury his interpretation of each of the “prior-art” patents

7) group “b” referred to on foregoing page 2 hereof, which included the Zeller patent on bag fastener, the Gould patent on label-carrier for luggage, the *Anderton patent for metal-tag for tagging finger-rings in jewelry stores*, the Lenk patent for ear-tags for tagging animals, and the Sagui patent for price-tags for finger-rings

8) group “a” referred to on foregoing page 2 hereof, among which the trial Judge specifically discredited the Whelan patent, and, in effect, discredited all patents in this group except Freeman, Godward and Fraser

9) See: R. 44, fifth line from the bottom; and R. 46, last paragraph

A certified copy of the transcript of the Record of the case at bar, including the proceedings of the Circuit Court of Appeals for the Third Circuit, is furnished herewith in accordance with Rule 38 of the Rules of this Court.

**Statutory provisions believed to sustain
this Court's jurisdiction**

This Court has jurisdiction to review the decision and judgment of the U. S. Circuit Court of Appeals for the Third Circuit, sought to be reviewed, under Section 240-a of the Judicial Code (28 USC 347-a):

"In any case, civil . . . , in a circuit court of appeals . . . it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, . . . to require by certiorari, . . . after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it"

The Statutes Involved

This petition for writ of certiorari involves:

the *Seventh Amendment to the Constitution of the United States* guaranteeing the right of trial by jury in suits at common law, and giving immunity from re-examination of a "fact tried by a jury . . . otherwise . . . than according to the rules of the common law",

Sections 566 and 648 of the Revised Statutes of the United States (28 USC 770) which directly carry out the constitutional guarantee of the right of trial by jury of the Seventh Amendment, by legislative enactment providing that "*The trial of issues of fact in the district courts, in all causes except in equity and cases of admiralty . . . shall be by jury.*¹⁰",

10) all emphasis (as well as all parenthetical interpolations) in quotations contained in this Petition and the following Brief, are ours, unless otherwise indicated

Section 723 of the Revised Statutes of the United States (28 USC 384) which further implements 28 USC 770 in carrying out the constitutional guarantee of the right of trial by jury, by providing that "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

Section 4919 of the Revised Statutes of the United States (35 USC 67), further expressly providing for *suits at common law and jury-trials, for the recovery of "damages for the infringement of any patent"*, and

Rule 50-b of the 1938 Rules of Civil Procedure for the District Courts of the United States, relating to *judgments non obstante veredicto*.

The foregoing are set out, in full, in the Appendix hereto.

Date of Decision and Judgment to be Reviewed

The decision (R. 54, and *reported at 147 Fed. 2d 138*) and judgment (R. 59) of the United States Circuit Court of Appeals for the Third Circuit, sought to be reviewed, are each dated *January 17, 1945*, and, therefore, the within petition for writ of certiorari is timely under Section 1008 of the Revised Statutes (28 USC 350), which provides three months from date of the judgment to be reviewed, for filing a petition for writ of certiorari in this Court.

The Questions Involved

The fundamental question:

The fundamental question involved is whether the benefits of trial by jury (and of the immunity from re-examination of a fact found by a jury) are matters of right or matters of grace;—in suits at common law, generally, and in patent suits at common law, particularly, and whether Rule 50-b has so enlarged the trial Judge's powers as to make Rule 50-b a free instrument for the deprivation of the benefits of trial by jury in suits at common law, whenever

the trial Judge merely disagrees with the jury's verdict on a fact-question which was indubitably for the jury to determine.

Because the foregoing question is, of course, fully answered by the Seventh Amendment to the Constitution of the United States and by Section 770 of Title 28 of the United States Code, and because the decision below nevertheless, in effect, *plainly* denies these rights in a case in which the lower Court's own statements of record leave no room for any doubt but that the question was one of fact necessarily for the jury to determine, we now point out and particularize four underlying questions here involved; stating each of questions 2, 3 and 4 first generically and then specifically (1; 2-a & 2-b; 3-a, 3-b & 3-c; and 4-a & 4-b);—so as to point out both the broad aspect as well as the specific application of each of the last three of the underlying questions involved.

Question No. 1: Is *invention* a question of fact for the jury or a question of law for the trial Judge?

where the device of the patent-in-suit is admittedly not anticipated and is admittedly new and useful, and

where the only evidence offered upon the *sole* defense of "non-invention", is the same evidence which the Patent Office had considered in connection with the granting of the patent-in-suit,¹¹ and

where the presence of invention is confirmed by six branches of evidence of recognized probative value, which courts have always recognized as indicative of the presence of invention.

- 11) The only "prior-art" patent relied upon by the trial Judge on the entry of the *judgment non obstante veredicto* which the Patent Examiner had not specifically considered, was the Anderton patent taken from an admittedly non-analogous art (R. 46, line 19)

which the trial Judge (*throughout* the trial) regarded as having **no** substantial probative value (R. 25-26), and

which (40 days later) the trial Judge relied upon on the entry of *judgment non obstante veredicto* (R. 44, fifth line from bottom and R. 46, last paragraph) on his arbitrary conclusion, *wholly without support in any evidence* that the combination of a flat-headed crosspiece with non-folding hooking portions and an elongated slit into which it is insertable and from which it is removable, without folding and without destruction, by a 90° turn one way and a 90° turn another way, "*just permeates practically every art in which that sort of device is used at all*" and that "*it is something which is just adopted out of general art.*" (R. 46)

While *this feature* is only *one of several* constructional features which make up the device of the patent-in-suit, *this feature* does **not** "permeate practically every art" as the trial Judge concluded, without evidence, because, of the 15 hair-curler patents and the 5 non-analogous patents cited by respondent, *this feature* is found *only* in Anderton, and even there, only in a metallic tag in which the crosspiece has no tendency to restore itself, as it does in the device of the patent-in-suit, because the metal *stays* in any position into which it is bent. The other 4 non-analogous devices show hooking arrangements suitable only for a single use, instead for repeated re-use, because the hooking arrangement is destroyed or rendered useless by being *once* hooked into locking position;—whereas in the device of the patent-in-suit, the hooking is suitable for repeated re-use of the device because it is resilient and does not hook and unhook by folding the hooking-head, but, instead, by a 90° turn of the resilient body of the device.

If the trial Judge's view during the trial be adopted, then the Anderton patent is irrelevant, whereas if his view upon the entry of *judgment non obstante veredicto* be adopted, then it necessarily follows that the Patent Examiner must impliedly also have considered the feature for which the trial Judge then relied upon the Anderton patent, because then such feature must be regarded a matter of common knowledge and hence also within the Examiner's general knowledge.

Question No. 2-a: Can the legal presumption of the correctness of a prior quasi-judicial fact-finding of an administrative tribunal of the Federal Government, be overcome sufficiently to justify entry of *judgment non obstante veredicto* on the same issue of fact, in the face of substantial trial-evidence of acknowledged probative value confirming the correctness of such prior quasi-judicial fact-finding and supporting the jury's verdict, by merely re-introducing, in Court, the *same* evidence upon which such prior quasi-judicial fact-finding was based, plus some assertedly "new evidence" which the trial Judge (*throughout* the trial) regarded as having **no** substantial probative value?

or, stating it another way,

Question No. 2-b: Is the legal presumption of the presence of invention¹² flowing from the prior quasi-judicial determination of this fact-question by an administrative tribunal of the Federal Government (i. e. the Commissioner of Patents)

a) neutralized by *merely* introducing in evidence the *same* "prior-art" patents which that administrative tribunal had considered in connection with its determination,¹³ *plus* a group of additional "prior-art" patents which the trial Judge concluded were "*not anywhere near the patent*" in suit and "*a waste of time*" to consider,

and, if so,

b) is such legal presumption¹² *thereby* overcome so conclusively as to justify the trial Judge's re-

12) *Mumm vs Decker*, 303 U. S. 168, 171; 81 L. Ed. 983, 985 and *Radio Corporation of America vs Radio Engineering Laboratories, Inc.*, 293 U. S. 1; 79 L. Ed. 163 and *Park-In Theatres Inc. vs Rogers*, 130 Fed (2d) 745, 747; CCA 9, *Abbott vs Coe* 109 Fed (2d) 449, 451 (App. D. C.) and *Mississippi Valley Barge Line Co. vs United States* 292 U. S. 282, 286, 287; 78 L. Ed. 1260, 1264, 1265

13) which "prior-art" patents are *admitted* by the party offering them, and ruled by the trial Judge, **not** to disclose the same construction as that of the patent-in-suit

examination and over-riding of the jury's fact-finding of "invention";—

c) all without a scintilla of *other* evidence against such legal presumption of the presence of invention,

and

d) all *in the face of uncontradicted testimony confirmation of the legal presumption of the presence of invention*, including testimony of the practical superiority of the construction of the patent-in-suit, over the construction of the "prior-art"; of the confessed infringer's recognition of this superiority and the infringer's testimony that she "thought it was the best"; the infringer's preference for and copying of the device of the patent-in-suit (against the "prior-art" devices freely available to the infringer); the infringer's attempt to obtain an improvement upon the device so copied; the prior marketing of the device of the expired "prior-art" with unfavorable results; the wide public-acceptance of the device of the patent-in-suit; the manufacturing economy flowing from the construction of the patent-in-suit, which were passed on to the ultimate consumer; and the uncontradicted expert testimony that it would not be obvious, to those skilled in the art, to produce the construction of the patent-in-suit, even though they had before them all the "prior-art" relied upon by the infringer?

Question No. 3-a: Does Rule 50-b enlarge the trial Judge's powers (in respect to the Seventh Amendment to the Constitution of the United States, and Section 770 of Title 28 of the United States Code which implements said Amendment) so as to permit the trial Judge to enter *judgment non obstante veredicto* on an issue of fact, where the jury's verdict is admittedly supported

- by a prior quasi-judicial fact-finding of an administrative tribunal of the Federal Government, and
- by the acknowledged legal presumption of correctness of such prior fact-finding of said administrative tribunal, and

by uncontradicted testimony of acknowledged probative value;—

without a scintilla of evidence against the jury's fact-finding implied in its verdict, other than the *same* evidence upon which such prior quasi-judicial fact-finding of the administrative tribunal was based (plus additional documents which the trial Judge had regarded so remote and irrelevant, throughout the trial, as to be "a waste of time" to consider)?

or, stating it another way,

Question No. 3-b: Was not the trial Judge barred, by the Seventh Amendment to the Constitution and by Section 770 of Title 28 of the United States Code, from re-examining (and over-riding) the *fact* of "invention" *found by the jury*?

A: where the jury's verdict, based upon its finding of the presence of invention, was supported

- 1) by a prior quasi-judicial determination by a Federal administrative tribunal that invention was in fact present, which administrative tribunal had considered all of the same prior patents which the trial Judge, during the trial, had considered most pertinent,
- 2) by the confessed infringer's *admission* and the trial Judge's ruling that neither the prior patents which had been considered by the Patent Office in connection with the granting of the patent-in-suit nor any other prior patent disclosed the same *construction* as that of the *patent-in-suit*, and that the latter was *both new and useful* notwithstanding all the prior patents,
- 3) by the uncontradicted expert testimony that it would *not* be obvious to those skilled in the art to produce the admittedly new and useful construction of the patent-in-suit, even if they had before

them all of the "prior-art" patents relied upon by the respondent,

- 4) by the *admission* of respondent's *alter ego* (who had had many years of prior practical experience in the field) that she preferred the construction of the patent-in-suit (against those of the prior-art), because it was the easiest to use and most effective in actual use and because she "thought it was the best"; and the *admission* of respondent's deliberate copying of the device of the patent-in-suit and of the respondent's seeking an improvement patent thereon,
 - 5) by the uncontradicted testimony of other witnesses that the device of the patent-in-suit was superior in operation and in actual use and produced a superior end-result in the hair,
 - 6) by the uncontradicted testimony of the wide public acceptance of the device of the patent-in-suit,
 - 7) by the uncontradicted testimony of production-economies flowing from the construction of the patent-in-suit, which were passed on to the ultimate consumer, and
 - 8) by the trial Judge's own conclusion, during the trial, that one group of prior-art patents relied upon by respondent were "*not anywhere near the patent*" in suit and were "*a waste of time*" to consider, and that the other group of patents, regarded most pertinent, did *not* disclose the same construction as that of the patent-in-suit, and that the device of the patent-in-suit was both new and useful notwithstanding these other prior patents,
- and

B: where there is *not a scintilla of evidence against the jury's verdict*, other than

prior patents which the Commissioner of Patents had considered in making the prior quasi-judicial fact-

finding favorable to the patent-in-suit (and in harmony with the jury's verdict), and which patents the trial Judge had ruled did not disclose the same construction as that of the patent-in-suit, and

prior patents which the trial Judge had regarded (*throughout* the trial) as "not anywhere near the patent" in suit and "a waste of time" to consider.

Question No. 3-c: Is respondent's Motion to Set Aside Verdict (R. 43) based on a "*legal question*" within the meaning of Rule 50-b (and was it properly raised by respondent's Motion to Direct Verdict (R. 42) *stating* "*specific grounds*" within the meaning of Rule 50-a), which *was* reserved by Rule 50-b for "later determination" by the trial Judge when he denied (R. 35) respondent's Motion to Direct Verdict (R. 42)?

Question No. 4-a: May the trial Judge enter *judgment non obstante veredicto* for asserted insufficiency of the evidence, where such judgment was necessarily based upon evidence which he had theretofore (*throughout* the trial) considered to be so remote and of such doubtful probative value as to cause him to decline to receive testimony in rebuttal thereof ¹⁴?

or, stating it another way,

Question No. 4-b: Does not the fact that the trial Judge reached two different (and mutually incompatible) conclusions (one during trial, and the other 40 days thereafter) in respect to a piece of evidence necessarily relied upon to sustain a *judgment non obstante veredicto*,

conclusively establish that "reasonable men could differ" as to the conclusion to be drawn from the evidence, and

¹⁴) apparently because of his view, during the trial, that such piece of evidence did not have sufficient probative value to warrant its rebuttal

compel submission of such evidence for the jury's verdict, as being within its sole province, and

bar the entry of *judgment non obstante veredicto* in respect thereto? and

is not the entry of *judgment non obstante veredicto* then a deprivation of the benefits of a right of trial by jury and of the immunity from re-examination of a fact tried by a jury, under the Seventh Amendment to the Constitution and Section 770 of Title 28 of the United States Code?

Reasons Relied Upon for the Allowance of a Writ of Certiorari

The discretionary power of this Court, under Section 240-a of the Judicial Code (28 USC 347-a), is invoked on the following grounds:

1. The Circuit Court of Appeals for the Third Circuit has rendered an erroneous decision in the case at bar, in conflict with the hereinbelow cited decisions of this Court and of Circuit Courts of Appeals of the United States for other Circuits, namely:

a) As to what is within the sole province of the jury to determine, under the constitutional guarantees of the Seventh Amendment, the decision of the Circuit Court of Appeals for the Third Circuit in the case at bar, is in conflict with:

Berry vs U. S. 312 U. S. 449, 453; 85 L. Ed. 945, 947
Gunning vs Cooley 281 U. S. 90, 94; 74 L. Ed. 720, 724
Slocum vs N. Y. Life Ins. Co. 228 U. S. 364; 57 L. Ed. 879

Pedersen vs Delaware, L. & W. R. Co. 229 U. S. 146, 153; 57 L. Ed. 1125, 1128

Conway vs O'Brien 312 U. S. 492; 85 L. Ed. 969

Halliday vs U. S. 315 U. S. 94, 95, 96; 86 L. Ed. 711, 715

b) As to the trial Judge's powers under Rule 50-b to weigh the evidence (and to re-examine and over-ride the jury's verdict thereon), the decision of the Circuit Court of Appeals for the Third Circuit is in conflict with:

Virginia-Carolina Co. vs Dunbar 106 Fed. (2d) 383, 385 (CCA 4)

Duncan vs Montgomery Ward 108 Fed. (2d) 848 (CCA 8) modified at 311 U. S. 243 (85 L. Ed. 147) with an implied approval of the point for which we cite the case

Berry vs U. S. 312 U. S. 449, 453; 85 L. Ed. 945, 947

c) As to the meaning and effect, and weight to be given (and as to what is required to overcome) the legal presumptions attaching to a prior quasi-judicial determination by an administrative tribunal of the Federal Government, the decision of the Circuit Court of Appeals for the Third Circuit is in conflict with:

Mumm vs Decker 303 U. S. 168, 171; 81 L. Ed. 983, 985

Radio Corporation of America vs Radio Engineering Laboratories, Inc. 293 U. S. 1; 79 L. Ed. 163

Park-In Theatres Inc. vs Rogers 130 Fed. (2d) 745, 747; (CCA 9)

Abbott vs Coe 109 Fed. (2d) 449, 451 (App. D. C.)

Mississippi Valley Barge Line Co. vs United States 292 U. S. 282, 286, 287; 78 L. Ed. 1260, 1264, 1265

d) As to whether invention is a question of fact for a jury or a question of law for the trial Judge, the decision of the Circuit Court of Appeals for the Third Circuit is in conflict with:

Keyes vs Grant 118 U. S. 25; 30 L. Ed. 54, 57, 58

Thomson Spot Welder Co. vs Ford Motor Co. 265 U. S. 445, 446; 68 L. Ed. 1098, 1100

U. S. vs Esnault-Pelterie 299 U. S. 201, 205; 81 L. Ed. 123, 125

2. The Circuit Court of Appeals for the Third Circuit has rendered an erroneous decision in the case at bar, in conflict with and in violation of the Seventh Amendment to the Constitution of the United States, guaranteeing trial by jury and immunity from re-examination of a fact found by a jury, and in violation of Section 770 of Title 28 of the United States Code implementing said Amendment.

3. The Circuit Court of Appeals for the Third Circuit has rendered an erroneous decision in the case at bar, on important questions of Federal law which have not been, but should be, settled by this Court, namely, Questions 2 and 4 set out on foregoing pages 11 and 15, respectively.

4. The Circuit Court of Appeals for the Third Circuit, has so far departed from the accepted and usual course of judicial proceedings (in that it sanctions such departure by the trial Court) as to call for the exercise of this Court's power of supervision.

— — — — —

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, sitting at Philadelphia, Pennsylvania, commanding said Court to certify and send to this Court, on a date to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court, and that the judgment of the Circuit Court of Appeals for the Third Circuit may be reversed and that your petitioner may be granted such other and further relief as may seem proper;—all to the end that petitioner may have the benefit of the verdict which the jury rendered in this cause in favor of

petitioner, and that the right of trial by jury may be preserved intact.

WENDELL J. CALEY
by Wm. Steell Jackson
Leonard L. Kalish
counsel for petitioner

The undersigned hereby certify that the foregoing petition is in their opinion well founded, and that the case is one in which petitioner's prayer should be granted by this Court.

Wm. Steell Jackson
Leonard L. Kalish
counsel for petitioner



Appendix to Petition

The Seventh Amendment to the Constitution of the United States:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Sections 566 and 648 of the Revised Statutes of the United States (28 USC 770):

"The trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury."

Section 723 of the Revised Statutes of the United States (28 USC 384):

"Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

Section 4919 of the Revised Statutes of the United States (35 USC 67):

"Damages for the infringement of any patent may be recovered by action on the case, in the name of the party interested, either as patentee, assignee, or grantee. And whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three

times the amount of such *verdict*, together with the costs."

Rule 50-a of the Rules of Civil Procedure for the District Courts of the United States:

" . . . A motion for a directed verdict *shall* state the *specific grounds* therefor."

Rule 50-b of the Rules of Civil Procedure for the District Courts of the United States:

"Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; . . ."





**Brief for Petitioner
in support of
Petition for Writ of Certiorari**

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The opinions and judgments below

The opinion of the Court of Appeals for the Third Circuit is reported at 147 Fed. (2d) 138 and is also found on pages 54 to 59, inclusive, of the Record. The judgment of that Court, is on pages 59 and 60 of the Record.

The trial Judge's Order granting *judgment non obstante veredicto* is found at page 47 of the Record.

The trial Judge handed down no written opinion upon the granting of respondent's motion for *judgment non obstante veredicto*, but his oral remarks incident to the granting of such motion for *judgment non obstante veredicto* are found on pages 44 to 46, inclusive, of the Record filed herewith.

The transcript of the testimony and of the proceedings upon the trial (reproduced in the Record filed herewith) also shows the trial Judge's personal appraisal of the "prior-art" patents and of the patent-in-suit (in comparing the latter with the former), during the course of the trial (R. 9-35) and in his charge to the jury (R. 36-41);—as more particularly appears from pages 22, 24-28, 30, 33, 37-38, 40-41 of the Record.

The District Court's pre-trial opinion denying respondent's motion to strike petitioner's demand for jury trial is reported at 51 F. Supp. 377, and is also found on pages 4 to 8, inclusive, of the Record. *The Judge who rendered this opinion, upholding petitioner's right of trial by jury, is not the same Judge before whom the cause was later tried to a jury.*

Grounds on which jurisdiction is invoked

The grounds on which jurisdiction of this Court is invoked, are:

1) The date of the judgment to be reviewed is January 17, 1945, (judgment at R. 59, and opinion at R. 54).

2) The judgment was rendered in a suit, tried to a jury, under the patent statutes of the United States, to determine respondent's liability to petitioner for the confessed infringement of Letters Patent of the United States for an invention, issued by virtue of Section 4886 of the Revised Statutes of the United States (35 USC 31).

3) The statute under which jurisdiction of this Court is invoked is Section 240-a of the Judicial Code (28 USC 347-a).

4) Jurisdiction is invoked under Section 240-a of the Judicial Code (28 USC 347-a) because the decision below

a) is in conflict with applicable decisions of other Circuit Courts of Appeals and of this Court, and

b) violates the Seventh Amendment to the Constitution of the United States, and Section 770 of Title 28 of the United States Code which implements it, and

c) interprets Rule 50-b of the Rules of Civil Procedure for the District Courts of the United States in a way which is in conflict with the Seventh Amendment to the Constitution of the United States prohibiting re-examination of a fact tried by a jury, and

d) erroneously decides important questions of Federal law which have not been, but should be settled by this Court, namely, Questions 2 and 4 set out on pages 11-12 and 15-16 hereinabove, and

e) sanctions such departure from the accepted and usual course of judicial procedure as to call for the exercise of this Court's power of supervision.

5) The cases sustaining jurisdiction are:

Alexander Millburn vs Davis-Bournonville 270 U. S. 390
Carbice vs American Patents Development 283 U. S. 27
Adams Grease Gun Corp. vs Bassick Mfg. Co. 285 U. S. 531
Smith vs Hall 298 U. S. 652
Lincoln vs Stewart-Warner 303 U. S. 545

Statement of the Case

This suit was initiated by a complaint filed by respondent, Ryan Distributing Corporation¹⁵ (plaintiff below), seeking a declaratory judgment of non-liability to petitioner, Wendell J. Caley (defendant below) on account of infringement of petitioner's Caley patent No. 1,945,932 for Hair-curler or Waver, notwithstanding respondent's manufacture and sale of certain hair-curlers;— respondent's contention of non-liability being based on two grounds (alleged in the complaint), namely,

- a) that the patent-in-suit is invalid because anticipated by certain prior patents claimed by respondent to show the same hair-curler construction,

or

- b) that the patent-in-suit is invalid because lacking the quality of invention over these same prior patents (if they are found not to anticipate, that is, if they are found not to disclose the hair-curler construction of the patent-in-suit).

With his answer (denying the allegations of "anticipation" and "non-invention" of the complaint) petitioner

15) whose organizer, officer, principal owner and *alter ego*, L. L. Ryan, is a former employee of petitioner; having been employed by petitioner (from April 1940 to April 1941) to sell and demonstrate the hair-curler of the patent-in-suit (R. 9) and who immediately thereafter organized the respondent corporation for the sole purpose of making and selling hair-curlers (R. 10) and who, when asked why she did not adopt any one of the many hair-curler constructions of the expired "prior-art" patents freely available to her (instead of using the hair-curler construction of the patent-in-suit) stated that when she went to put a hair-curler on the market, she used the construction of the patent-in-suit because "that was the easiest way to close it" (namely to close the hair-curler) and because she "thought it was the best" (R. 23, RXQ. 81)

filed a counter-claim against respondent under R. S. § 4919 (35 USC 67) charging that the hair-curlers manufactured and sold by respondent infringed petitioner's patent, and praying for damages arising from said infringement.

Respondent filed a reply to said counterclaim, re-alleging "anticipation" and "non-invention" as defenses to the charge of patent infringement presented by the counter-claim and also denying infringement.

The petitioner's Caley patent No. 1,945,932 in suit constitutes Caley's Exhibit 1 and is reproduced at pages 48 to 51 of the Record. In *Figures 8 and 9* of the drawings (R.49) of the patent-in-suit, the petitioner, at the outset, disclosed to the Patent Office (and to the public, upon the issuance of his patent) the nearest "prior-art".¹⁶

The case was tried to a jury.

The Uncontradicted Testimony Supporting the Jury's Verdict

The following is the **uncontradicted** testimony supporting the verdict:

For three years (R.34), namely from 1931 to 1933, inclusive, petitioner had manufactured and sold, in substantial quantities, under his trade-mark "*Curly*" (R.26, last 2 lines, and R.34, 20-21, 15), but with unfavorable practical results in the hands of the ultimate user, the prior-art hair curler of the then long-expired Godward patent, which hair-curler is shown in *Figures 8 and 9* of the drawings of the patent-in-suit (R.44, 26-27) and is there designated as the "Prior-Art".

The hair-curler of the patent-in-suit, sold by petitioner under his trademark "*Vassar*", is much easier and quicker

¹⁶ the hair-curler of *Figures 8 and 9* of the drawings of the patent-in-suit is substantially the same as (R. 26-27) the hair-curler of the prior Godward patent *relied upon by the Circuit Court of Appeals* (R. 56) as the nearest approximation to the hair-curler of the patent-in-suit;—over which Godward hair-curler (among others) the Patent Office had adjudged petitioner's hair-curler of the patent-in-suit to be inventive, and which Godward hair-curler the trial Judge concluded "does not have all the things" of petitioner's hair-curler of the patent-in-suit (R. 26)

to use (R.15, XQ24, R.20, Q7), and does not break the finger nails of the person using the curler, as does the prior-art hair-curler of the long-expired Godward patent (R.14, XQ23; 15 XQs24-25).

The prior-art hair-curler (of Godward) is also "hard to use" and "much slower to use" (R.20) and "you couldn't pull it through the hair" because it "will tangle all up in your hair" so that "you had to unroll each curl separately" (R.16, RDQ29). The hair-curler of the patent-in-suit "could be more easily removed from the curl without having to unwind the curl" (R.21, RDQ26; R.22, RDQ27).

The construction of the patent-in-suit saved 60% of the manufacturing cost (R.20, Q8; R.34, RDQ29), which saving was reflected in a *lower price to the ultimate consumer*, to whom the price was reduced from $\frac{1}{2}$ to $\frac{1}{3}$ of the price at which the hair-curler of the long-expired Godward patent had been sold (R.20-21, Q9);— yet affording petitioner a greater profit (R.21, Q10).

These improvements in greater ease in use and operation of the hair-curler of the patent-in-suit and the improved results produced by it in the hair, were due to *the differences* between its construction and the construction of the prior-art hair-curler (R.14, XQ23; R.15, XQ24; R.16, XQs29-31; R.19-20, Qs6-7; R.21-22, RDQ26-27).

One skilled in the hair-curler business and having before him all of the "prior-art" patents relied upon by respondent, would not find it obvious to produce the construction of the patent-in-suit, and the construction of the patent-in-suit is not "what they would do" (R.30, Q27; also R.32, Q41).

The first year (1933) the hair-curler construction of the patent-in-suit was sold, alongside the Godward hair-curler, the hair-curler of the patent-in-suit outsold the "prior art" hair-curler by better than 4 to 1, and that thereafter the yearly sales of the hair-curler of the patent-in-suit steadily increased from 860,000 in 1933, to 10,000,000 in eight years'

time;— twenty times more than were ever sold in any year of the Godward hair-curler (R.34, RDQ28).

Respondent's *alter ego*, L. L. Ryan, when called by petitioner on cross-examination, admitted her preference for the construction of the patent-in-suit (to those of the expired "prior-art") because it worked better and because she "thought it was the best" (R.23, RXQ80).

Respondent deliberately copied the hair-curler construction of the patent-in-suit (R.9, 16-17, 23) and then sought to obtain an improvement patent thereon (Caley's Exhibit 9).

This uncontradicted testimony and evidence is, in part, summarized by the Circuit Court of Appeals, in its opinion, in lines 13 to 18, inclusive, of page 58 of the Record filed in this Court.

**Respondent's admissions
and
the trial Judge's rulings and remarks**

During the trial, respondent admitted that its hair-curlers infringed (R.16-17) the patent-in-suit, and that **none** of the "prior-art" patents (exclusively relied upon by respondent) anticipated the patent-in-suit (R.22), that is, that **none** of them showed the same hair-curler construction as that of the patent-in-suit (R.37-38), and that respondent's sole defense to its *prima facie* liability to petitioner for such confessed infringement, was the defense of "non-invention" (R.22), and the trial Judge so ruled (R.37-38, R.47) and, indeed, instructed the jury that petitioner's device of the patent-in-suit was both new and useful (R.37-38);— all as shown by the quotations hereinbelow.

At the conclusion (R.22) of petitioner's opening evidence (R.9-22) and before respondent put in its case attacking the validity of the patent-in-suit, the Court asked respondent's counsel whether the issue in the case was not

that of "invention over the prior-art", and respondent's counsel acknowledged that to be **the** issue:

the trial Judge: "I suppose the issue is invention over the prior art, isn't it?"

respondent's counsel: "Yes, sir." (R.22)

Thereupon, as its entire case, respondent introduced in evidence *only* a copy of the "file-wrapper" (Ryan's Exhibit 2) of petitioner's Caley patent-in-suit, and folder (Ryan's Exhibit 3) containing prior U. S. patents ¹⁷ (on its contention of "non-invention"), without a single word of testimony in regard to such prior patents and without calling a single witness throughout the case.

Before petitioner's rebuttal, respondent's counsel sought and was given an opportunity to, and did personally explain to the Judge and the jury, counsel's own interpretation of the "prior-art" patents (which, collectively, constitute Ryan's Exhibit 3);— not by way of testimony or evidence, but merely by way of counsel's statement. During this statement, respondent's counsel admitted that the hair-curler of petitioner's patent-in-suit was *not* anticipated by any of these "prior-art" patents, namely that not one of these "prior-art" patents shows the various features which make up the claimed invention of the patent-in-suit:

respondent's counsel: ". . . Of course, what it comes down to is, Your Honor, that **the various features which** Caley says **make up his patent or invention** are, each of them, themselves old, and we say **we don't find** all of them, for instance, **in one patent**, . . . (R.22),

thereby again confirming that the sole issue in the case (upon the trial) was the question whether petitioner had, in fact, exercised the inventive faculties, in bringing into being the *admittedly* new, different and useful hair-curler of his patent-in-suit.

¹⁷⁾ 15 of these being on hair-curlers, and 5 on devices in *other* arts, such as Zeller on bag-fastener, Gould on label-carrier for luggage, Anderton on metallic tag for tagging finger-rings in jewelry stores, Lenk on ear-tag for tagging animals, and Sagui on price-tag for finger rings

Thereupon, in rebuttal (R.23-35), petitioner recalled respondent's founder and officer, Mrs. Ryan (R.23), and called a recognized expert, Mr. H. S. Fairbanks¹⁸ (R.24-33), and recalled petitioner (R.34-35).

When asked why she did not use a different hair-curler construction (rather than the construction of the hair-curler of the patent-in-suit), Mrs. Ryan said that when she went to put a hair-curler on the market¹⁹, she used the construction of the patent-in-suit because "that was the easiest way to close it" (namely, to close the hair-curler) and because she "thought it was the *best*" (R.23, RXQ80), and that she did not know whether she "got it from Mr. Caley" or whether she "got it from her sub-conscious mind" (R.23, RXQ80). When, in petitioner's rebuttal, the expert, Mr. Fairbanks proceeded to compare the "prior-art" patents theretofore offered by respondent (without a word of testimony) with the patent-in-suit, the trial Judge, himself,

specifically discredited three of the "prior-art" patents *taken from other arts*, namely the Zeller patent (on bag-fastener), the Gould patent (on label-holder for luggage), and the Anderton patent (on metallic tag for tagging finger-rings in jewelry stores), and one of the prior hair-curler patents, namely the Whelan patent,

and generally discredited all the "prior-art", except the Freeman²⁰ (R.25), Godward (R.26) and Fraser (R.27-28, 30) over which the Patent Examiner had allowed the patent-in-suit;—

by first saying that Zeller's bag-fastener would not be practical as a hair-curler (R.24) and that neither he (the trial Judge) nor anybody else would expect an ordinary mechanic to convert the Zeller bag-fastener into a hair-curler

18) who has specialized in Patent Office practice for over 40 years (R. 31, Q. 34)

19) directly upon leaving petitioner's employ (R. 9-10)

20) Freeman is the same as Godward except for a feature not material here, and it was conceded that Freeman was also fairly represented by Figures 8 and 9 of the drawings of the patent-in-suit

(R.25), and that these patents, *including the Anderton patent later relied upon by the Circuit Court of Appeals "are not anywhere near the patent" in suit* (R.26), and by then asking petitioner's counsel not even to examine the expert ²¹ on these "prior-art" patents, because, in the trial Judge's *then* opinion, these "prior-art" patents were so irrelevant that their consideration by the expert would be "a waste of time" ²² (R.26).

Not only did the trial Judge regard these prior patents *taken from other arts* (such as the Anderton patent ²³ on a metallic tag for tagging finger-rings in jewelry stores) and, indeed, *all* prior-art patents except Freeman, Godward and Frazer, *so irrelevant as to make it a waste of time to give them any consideration during the course of petitioner's rebuttal case*, as shown hereinabove, but the trial Judge was then also of the opinion (both during petitioner's rebuttal as well as in his charge to the jury) that even the hair-curler patents of Freeman, Godward and Fraser, which the trial Judge thought were the nearest approximations to the hair-curler of the Caley patent-in-suit (and all of which the Patent Examiners had considered), *did not show the same hair-curler construction as that of the patent-in-suit*.

21) called, *inter alia*, to compare the "prior-art" hair-curlers with that of the patent-in-suit

22) "THE COURT: It is a bag fastener, and it would not be very practical to curl your hair with a bag fastener." (R. 24)

"Q. 8. Would you expect an ordinary mechanic to convert this Zeller bag fastener—

THE COURT: No, I wouldn't either and nobody else would.

A. I don't think so." (R. 25)

"THE COURT: . . . there are some of these (prior-art patents offered by respondent), that you don't need to spend time on." (R. 25)

Don't bother with Whelan. Don't bother with Gould. Don't bother with Anderton. They can all be submitted to the jury." (R. 25)

"MR. KALISH: I didn't quite get Your Honor's statement. Does Your Honor want us not to consider these at the moment?

THE COURT: I do not think it is worth it. I think it is a waste of time. They show here and there a feature but **they are not anywhere near the patent**" (in suit) (R. 26)

23) later relied upon by the Circuit Court of Appeals (R. 57)

Thus, in respect to the *only hair-curler patent relied upon by the Circuit Court of Appeals*, namely, the Godward patent, the trial Judge said (R.26): "*Of course it does not have all the things*" (namely all the features of the Caley hair-curler of the patent-in-suit). The hair-curler of the Godward patent is substantially like the hair-curler which petitioner had initially shown in Figures 8 and 9 of the drawings of his patent-in-suit (R.49) as representative of the "Prior-Art", and over which the Patent Office had, theretofore adjudged petitioner's hair-curler *inventive*.

In reference to the Frazer patent which was cited by the Patent Examiner in the "file-wrapper" (Ryan's Exhibit 2, p. 12) of the Caley patent-in-suit, the trial Judge said (R.30): "*We all agree that it is not the same construction*" (namely, the hair-curler of the Fraser patent is not the same construction as the Caley hair-curler of the patent-in-suit).

The trial Judge then acknowledged (R.33) that petitioner's expert *had* testified ²⁴ directly on the *fact-question* of invention over the prior-art, to the effect that "*an ordinary skilled mechanic*" would **not** "*think of the Caley device even though he had all these prior devices before him*" (R.33).

The Court's charge to the jury

Finally, in his charge to the jury, the trial Judge again acknowledged, not only his own opinion, but also the complete *lack of any dispute* about the fact, that *none* of the prior-art patents showed the same combination of structural elements or features as those contained in or composing petitioner's hair-curler of the patent-in-suit:

the trial Judge: "*. . . nobody disputes that this hair curler (i. e. petitioner's hair-curler of the patent-in-suit) is useful, nobody disputes that it is new in the sense that just that combination has not been made before*" (R.37-38),

²⁴) R. 24, Q.'s 4-5; R. 25, Q. 7; R. 29, Q. 23; R. 30, Q. 27; R. 32, Q. 41; R. 33, Q. 72.

and then the trial Judge went on again to point to the *sole* question in the case;—namely:

“The question is whether it (i. e., the hair-curler of the patent-in-suit) is invention”;—

the trial Judge further pointing up this fact-question, to the jury, near the end of his charge:

“*That is the question you really must decide here*” (R.40).

The trial Judge acknowledged that the commercial success and public-acceptance of petitioner's hair-curler of the patent-in-suit, as shown by the evidence, was entitled to weight, as evidence of invention (R.41), and the trial Judge also carefully charged the jury, at length, on the fact-question of invention, and, indeed, quoted from the decisions of several courts on what some of the earmarks of invention were and what some of the earmarks of non-invention were;—including a quotation from this Court's historic decision in *Cuno Engineering Co. vs Automatic Devices Corp.*, 314 U. S. 84, 90, 91.

The Jury's Verdict

The jury rendered a verdict in favor of petitioner, on the *sole* question presented to it, namely, whether

- (1) *in view of* the 20 “prior art” patents exclusively relied upon by respondent and theretofore largely discredited by the trial Judge during the trial, and
- (2) *in view of* the testimony of the five witnesses called by petitioner, confirmatory of the presumptive² presence of invention,

petitioner had, *in fact* exercised the inventive faculties in bringing into being the hair-curler of his patent-in-suit.

2) see footnote 1, *supra* (page 1)

**Respondent's Motions
and
the trial Judge's rulings thereon**

On October 23, 1943, (2 days after verdict) respondent filed two alternative motions (R.43), namely,

- 1** to have the verdict of the jury set aside and to have judgment entered *in accordance with respondent's theretofore denied motion (R.42) for directed verdict and as contrary to the law and the evidence;*
or, in the alternative

- 2** for a new trial.

Respondent's theretofore denied (R.35) motion (R.42) for directed verdict (upon which respondent predicated its post-verdict motion for *judgment non obstante veredicto*) was based on *two* grounds, namely, that the hair-curler of the patent-in-suit

- a: is "old", or "anticipated by the prior-art"
and

- b: does "not amount to invention", or is "lacking in invention over the prior art in evidence".

Forty days after the jury's verdict favorable to petitioner, on the (above-stated) *sole* question presented to it for decision, the trial Judge

granted respondent's motion (R.47) to set aside the verdict and for *judgment non obstante veredicto*, on ground "b", above, but

denied respondent's motion (R.47) to set aside the verdict and for *judgment non obstante veredicto*, on ground "a", above, by striking out from the form of order prepared by respondent's counsel, the words "are old or" and the words "anticipated by the prior-art" and

did *not* pass upon respondent's alternative motion for new trial.

Specification of Errors

The errors which petitioner will urge, if the writ of certiorari is allowed, are the following:

1) The Circuit Court of Appeals for the Third Circuit erred in holding, in effect, that the District Judge's power in patent cases is wide enough to substitute his personal opinion, in place of the jury's verdict, on the question of invention, which question this Court has always recognized to be a *fact-question*, and which, on the District Judge's own appraisal of the evidence, as shown by his statements throughout the trial and in his charge to the jury, was clearly and purely a fact-question on which the legal presumptions and the evidence were *at least* such that "reasonable men could differ" on the conclusions (of "invention" or "non-invention") to be drawn therefrom, and, indeed, on which fact-question the legal presumptions and the evidence were preponderantly favorable to the presence of invention in the patent-in-suit and to the jury's verdict based upon its finding that invention was present.

2) The Circuit Court of Appeals for the Third Circuit erred in sustaining a *judgment non obstante veredicto* based upon a complete misinterpretation of the meaning, and an utter disregard of, the legal presumptions (here, the presence of invention) flowing from a prior quasi-judicial determination of the fact-question involved, by an administrative tribunal of the Federal Government (here, the Patent Office), and that Court has thereby erroneously deprived such legal presumptions of all practical meaning.

3-a) The Circuit Court of Appeals for the Third Circuit erred in sustaining the *judgment non obstante veredicto*, which deprived petitioner of the benefit of the trial by jury and of the immunity from re-examination of a fact tried by a jury guaranteed by the Seventh Amendment to the Constitution of the United States and by Section 770 of Title 28 of the United States Code which implements said Amendment.

3-b) The Circuit Court of Appeals for the Third Circuit erred in sustaining the *judgment non obstante veredicto*, in a situation which presented a pure question of fact, with a strong legal presumption supporting the verdict and with the overwhelming weight of the evidence supporting the verdict;—thereby erroneously extending Rule 50-b of the Federal Rules of Civil Procedure in a way which brings that Rule squarely into conflict with the Seventh Amendment to the Constitution of the United States guaranteeing trial by jury and immunity from re-examination of any fact tried by a jury, and into conflict with Section 770 of Title 28 of the United States Code which implements said Amendment.

3-c) The Circuit Court of Appeals for the Third Circuit erred in sustaining a *judgment non obstante veredicto* which was *not* based upon any “legal question” within the meaning of Rule 50-b and which was *not* based upon any “legal question” raised by any statement of “specific grounds” within the meaning of Rule 50-a in the prior-denied Motion for directed verdict, and because upon the denial of such Motion for directed verdict, there was no “legal question” reserved by Rule 50-b for “later determination”.

4-a) The Circuit Court of Appeals for the Third Circuit erred in sustaining the *judgment non obstante veredicto* which was based upon the trial Judge’s wholly arbitrary conclusion, 40 days after trial, that a certain mechanism ²⁶ which was one of the several features of the device of the patent-in-suit “permeates practically every art” and “is something which is just adopted out of general art” (R.46), which conclusion is not supported by the evidence and as to which *same* mechanism the trial Judge had 40

26) namely, the combination of a flat-headed crosspiece with non-folding hooking portions and a elongated slit extending longitudinally of the body, into which such crosspiece can be hooked and from which it can be unhooked without folding and without destruction, by a 90° turn one way and 90° turn the other way, and in which the body restores itself into locking position, and which can be repeatedly re-used

days earlier, *throughout* the trial, concluded that the *only* one of respondent's 20 "prior-art" patents (namely the Anderton patent) which came anywhere near disclosing this mechanism was "not anywhere near the patent" in suit and "a waste of time" to consider and as to which same Anderton patent, the trial Judge, even 40 days later, conceded was *not* from an analogous art (R.46) and as to which same mechanism and Anderton patent the trial Judge had declined to receive rebuttal testimony on the ground that such Anderton patent was too remote (R.25-26).

4-b) The Circuit Court of Appeals for the Third Circuit erred in sustaining the *judgment non obstante veredicto* in a situation in which even the trial Judge reached two different (and mutually incompatible) conclusions (one during the trial and one 40 days thereafter) in respect to evidence necessarily relied upon to sustain such *judgment*, and where the trial Judge had, in fact, influenced the jury in disregarding such evidence.

Argument.

Point No. 1: invention is a question of fact for the jury

In the absence of anticipation, that is, if, as here, admittedly *none* of the "prior-art" patents relied upon discloses the same construction as that of the patent-in-suit, then the question of "invention" is a question of fact for the jury. The question of invention may be stated as follows: did the patentee (here the petitioner) exercise the inventive faculties in bringing into being the device or the construction of the patent-in-suit?—on the assumption that he had before him all the devices or constructions of the "prior-art" patents relied upon.

That such question of "invention" is a question of fact for the jury has been uniformly ruled by this Court from the earliest cases to the present.

In *Keyes vs Grant*, 118 U. S. 25; 30 L. Ed. 54, 57, 58, this Court said:

"The judgment entered on the verdict rendered in favor of the defendants, in pursuance of the direction of the court, can be maintained only on the ground, either that the legal identity of the furnace described by Karsten with that covered by the plaintiffs' patent was manifest as a matter of law, or that it was established as a matter of fact, so conclusively by the evidence that a verdict the other way could not be supported, within the rule as stated in *Randall v. Baltimore & O. R. R. Co.*, 109 U. S. 478 (Bk. 27, L. ed. 1003).

Clearly it was not matter of law that the specification of the plaintiffs' patent, and the publication of Karsten, taken in connection with the drawings intended in illustration, described the same thing. The differences were obvious in the arrangement of the parts, and the relation of the basin in one, and the fore hearth in the other, to the interior of the furnace, and the mode of connection the one with the other for the

purpose of drawing the metal from the furnace. So that it certainly was not a matter of mere judicial knowledge that these differences were either not material in any degree to the result or, if material at all, were only such as would not require the exercise of the faculty of invention but would be suggested by the skill of an experienced workman employed to produce the best result in the application of the well known arrangements of the furnace. It was claimed, on behalf of the plaintiffs, that the furnace described in the patent and as used by them, embodied an idea not contained in or suggested by Karsten's publication. That idea consisted in the employment of a basin to receive the molten metal, located at a suitable elevation above the bottom of the furnace, and connected with the interior of the furnace by means of a tube, so that, instead of tapping a lead smelting furnace by withdrawing the molten metal through a tap hole near the bottom, it was proposed to allow the metal to flow upward into the receiving basin under the operation of the familiar natural law that liquids will seek the same level in communicating vessels. The object to be attained by this arrangement was that clean metal, unaccompanied with slag or other impure products resulting from the operation of smelting lead ores, should, after settling to the bottom of the furnace, by reason of its greater specific gravity ascend through the connecting tube, as the mass of molten metal accumulates and rises within the furnace, into the receiving basin, and be dipped thence with a ladle. It was insisted by the patentees that no such arrangement and combination were to be found in Karsten's publication or in the furnaces depicted in his figures, and that the improvement which they constituted was not the result of mere mechanical skill, but sprung from a genuine effort of invention. And this view was supported by the opinion of many experts skilled in the art.

In our opinion this was a question of fact properly to be left for determination to the jury, under suitable instructions from the court upon the rules of law, which should guide them to their verdict. And there was evidence upon both sides of the issue sufficient to require that it should be weighed and considered by the jury in the determination of the question; and this implies that, if it had been submitted to the jury and the verdict had been for the plaintiffs, it would not have been the duty of the court to have set it aside as not supported by sufficient evidence. The court erred, we think, in withdrawing the case from the jury as it did by directing a verdict for the defendants.

For this error the judgment is reversed, and the cause remanded, with directions to grant a new trial; and it is so ordered."

To like effect is this Court's decision in *Thomson Spot Welder Co. vs Ford Motor Co.*, 265 U. S. 445, 446; 68 L. Ed. 1098, 1100, in which this Court said:

"The question whether an improvement requires mere mechanical skill or the exercise of the faculty of invention is one of fact; and, in an action at law for infringement, is to be left to the determination of the jury." (citing *Keyes vs Grant*, supra, and other authorities)

To like effect is this Court's decision in *U. S. vs Esnault-Pelterie*, 299 U. S. 201, 205; 81 L. Ed. 123, 125 in which this Court cited with approval its earlier decision in *Keyes vs Grant*, supra.

While it is apparent from the trial Judge's remarks during the trial as well as from his instructions to the jury, that throughout the trial he regarded the question of invention (which was the sole issue in the case) to be a question of fact and one within the province of the jury to determine, the trial Judge apparently adopted the erroneous contrary view 40 days later, when he came to consider respondent's motion for judgment notwithstanding

the verdict;—which latter erroneous view the Court of Appeals erroneously sustained.

As admittedly *none* of the “prior-art” patents relied upon by respondent disclosed the same construction as that of the patent-in-suit, and as the device of the patent-in-suit was admittedly new and useful (R.37-38), and as the “prior-art” patent (Anderton) necessarily relied upon both by the trial Judge as well as by the Court of Appeals to sustain the *judgment non obstante veredicto* was one which, *throughout* the trial, the trial Judge had regarded (and told the jury) was “not anywhere near the patent” in suit and “a waste of time” to consider (R.25-26), and as such “prior-art” patent (Anderton) was admittedly from a **non-analogous** art (R.46) and was the only one of the 20 prior-art patents relied upon by respondent which even assertedly disclosed *one* of the several essential features of the device of the patent-in-suit, it inescapably follows that the Courts below, in sustaining a judgment notwithstanding the verdict, have plainly arrogated to themselves the determination of a pure fact-question. In this regard both lower Courts erred.

Point No. 2: Presumption of “invention” flowing from grant of patent.

In *Mumm vs Decker* 303 U. S. 168, 171; 81 L. Ed. 983, 985, this Court reiterated what has always been recognized to be the law, namely, that

“The issue of the patent is enough to show, until the contrary appears, that all the conditions under which a discovery is patentable in accordance with the statutes have been met. Hence, the burden of proving want of novelty is upon him who avers it. Walker, Patents, § 116. Not only is the burden to make good this defense upon the party setting it up, but his burden is a heavy one, as it has been held that ‘every reasonable doubt should be resolved against him’”.
(citing authorities)

The principle has been reiterated many times in other patent cases;—of which the following are but a few:

Radio Corporation of America vs Radio Engineering Laboratories, Inc. 293 U. S. 1, 2; 79 L. Ed. 163, 165

“The respondent, defendant in the trial court, admits the infringement if the patents are valid, but maintains that they are void in that they were issued to a patentee who was not the first inventor.

“Long before this suit the rival claimants to the invention, Armstrong and De Forest, had fought out between themselves the legal battle now renewed. The outcome of their contest was a decree whereby priority of invention was found in accordance with the patents now assailed by the respondent, a decree binding on the claimants and their several assignees. For the purpose of any controversy between Armstrong and De Forest the validity of the patents must be accepted as a datum. Even for the purpose of a controversy with strangers there is a presumption of validity, a presumption not to be overthrown except by clear and cogent evidence. The question is whether the respondent has sustained that heavy burden.”

Abbott vs Coe 109 Fed. (2d) 499, 451 (App. D. C.):

“ ‘While the judgment of Patent Office officials is not absolutely binding on the courts, it is entitled to great weight, and is to be overcome by clear proof of mistake.’ *Robertson v. Cooper*, 4 Cir., 46 F. 2d 766, 768. *Oldroyd v. Morgan*, 58 App. D. C. 78, 24 F. 2d 1004; *Austin v. Coe*, 63 App. D. C. 94, 69 F. 2d 832. These principles have special force when the administrative tribunal of the Patent Office has decided a technical question within its field, for ‘it is just such questions that the administrative tribunal is pre-eminently qualified to solve.’ *Gold v. Gold*, 7 Cir., 237 F. 84, 86. The question of invention is within this category; ‘The Patent Office has the equipment for deciding intricate

and technical questions of this character.' Robertson v. Cooper, 4 Cir., 46 F. 2d 766, 768. In re Alden, 65 F. 2d 136, 137."

* * * * *

"The 1927 amendments (44 Stat. 1336) of R. S. § 4915, 35 U. S. C. § 63, 35 U. S. C. A. § 63, do not affect the presumption that the Patent Office is right. General Talking Pictures Corporation v. American Tri-Ergon Corporation, 3 Cir., 96 F. 2d 800, 811; Dowling v. Jones, 2 Cir., 67 F. 2d 537, 538; Syracuse Washing Machine Corporation v. Vieau, 2 Cir., 72 F. 2d 410, 411; Powell v. McNamara, 2 Cir., 74 F. 2d 750; Bayer v. Rice, 64 App. D. C. 107, 75 F. 2d 238; Gerhardt v. Goserud, D. C., 24 F. Supp. 161."

To like effect is

Park-In Theatres, Inc. vs Rogers 130 Fed. (2d) 745, 747 (CCA 9)

This rule, in regard to the legal presumptions flowing from the grant of a patent, is merely a specific application of the broader general rule that the correctness of a prior quasi-judicial determination of a fact-question (in this case, the presence of invention) by an administrative tribunal of the Federal Government (in this case, the United States Patent Office), is a presumption of law, and that such presumption cannot be met and overcome on the basis of merely the same evidence which that administrative tribunal had considered in making its prior determination of such fact-question:

Mississippi Valley Barge Line vs United States 292 U. S. 282, 286, 287; 78 L. Ed. 1260, 1264, 1265 and authorities therein cited.

The same rule has been laid down by this Court in the case of *Morgan vs Daniels*, 153 U. S. 120, 123; 38 L. Ed. 657, 658, in respect to the Patent Office's prior quasi-judicial determinations of fact-questions. This rule and

this Court's decision in *Morgan vs Daniels* have been followed in many cases, including the case of *General Talking Pictures Corp. vs American Tri-Ergon Corp.* 96 Fed. (2d) 800, 812 (CCA 3) wherein the Court said:

"The evidence presented before the tribunals of the Patent Office and that received in the hearing in the District Court contain no substantial differences. All evidence both 'new' and 'old' has been carefully considered and much of it has been analyzed in this opinion. There is nothing in the evidence presented to the District Court of sufficient importance to overcome the findings of the tribunals of the Patent Office, and the rule enunciated by the Supreme Court in *Morgan vs Daniels* must be held to apply to the facts of the case at bar to prohibit the granting of the relief sought by the appellees in their bill of complaint."

In *Austin vs Coe* 69 Fed. (2d) 832, 834 (App. D. C.) the Court said:

"It is important also to note that no original or additional evidence of any kind was submitted by appellants in the lower court. The case was heard upon a certified transcript of parts of the record made in the Patent Office. Accordingly the issue thus presented to this court has been decided by the examiner . . . the decision there made must be accepted as controlling, upon that question of fact in any subsequent suit . . ." (citing *Morgan vs Daniels* 153 U. S. 120)

In *Curtiss vs Janin* 287 Fed. 454, 455 (CCA 2) the Court said:

"The principal plaintiff herein is a patent seeker, exercising his statutory right of demanding from a court of equity what the regular administrative bureau has refused. Such a party is very properly compelled to assume a heavy burden of evidence. Not only must

his case carry thorough conviction by the character and amount of evidence (*Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657), but, if facts are seriously in dispute, he must adduce in his equity suit new and persuasive testimony not submitted to the administrative tribunal (*Gold v. Newton*, 254 Fed. 824, 166 C. C. A. 270)."

To like effect see *Schilling vs Schwitzer-Cummins*, 142 Fed. (2d) 82 (App. D. C.), March 31, 1944.

In the case at bar, the only "prior-art" patents which the trial Judge regarded pertinent were the prior hair-curler patents to Godward,²⁷ Freeman²⁷ and Fraser²⁸ which the Patent Examiners had considered in connection with their examination of the patent-application upon which the patent-in-suit was granted and considered in their determination of the fact-question of "invention" in the patent-in-suit.

This greatly strengthens the legal presumption that invention is present in the patent-in-suit, as shown by the following decisions:

Gulf Smokeless Coal Co. vs Sutton, Steele & Steele 35 Fed. (2d) 433, 437 (CCA 4); cert. denied 280 U. S. 609

"Prior patents relied upon as anticipations were carefully considered and numerous changes were made in the claims before the patents were finally issued. It is well settled that in such case the presumption of patentability arising from the issuance of the patent is greatly strengthened."

27) the constructions of the patents to Godward and Freeman were exemplified in Figures 8 and 9 of the drawings of the patent-in-suit and called to the Patent Office's attention as "Prior-Art"

28) The earlier Fraser patent was cited in the file-wrapper of the patent-in-suit (Ryan's Exhibit 2) while the later Fraser patent was co-pending with the patent-in-suit, and there having been no interference declared (under 35 USC 52) between these two co-pending patent-applications, it must be concluded (R. 30-31, Q28-32)

"that the Patent Office did not consider the inventions the same. They considered the Caley patent different from the disclosure of Fraser."

See also to like effect:

Nordberg Mfg. Co. vs Woolery Machine Co. 79 Fed. (2d) 685, 687 (CCA 7)

J. A. Mohr & Son vs Alliance Securities Co. 14 Fed. (2d) 799 (CCA 9)

Chesapeake & O. Ry. Co. v. Kaltenbach, 95 Fed. (2d) 801 (CCA 4)

It is respectfully submitted that the legal presumption of invention has not even been successfully rebutted, or neutralized, in the case at bar. Indeed, because the trial Judge found, and so instructed the jury (R. 26, R. 30 Q. 26, R. 37-38), that even the most pertinent prior art (Godward and Fraser, which the Patent Examiner had expressly considered) did not disclose the same construction as is disclosed in the patent-in-suit, and that the device of the patent-in-suit was both new and useful when contrasted with all the prior patents relied upon by respondent (R. 37-38).

In view of respondent's complete failure to rebut the presumption of validity attaching to the patent-in-suit, it would have been entirely proper for the trial Judge to have instructed the jury to return a verdict holding the patent valid, upon the theory that respondent's failure to make out a prima facie case of "invalidity" was fatal to its case. Presumably out of an abundance of caution and because he wanted to give respondent the opportunity of having his meager and unsatisfactory evidence considered by the jury, the trial Judge gave respondent the benefit of the doubt and sent the case to the jury, which considered the evidence for and against "invention" and found, as it should, that the patent-in-suit *did* represent invention over the prior-art.

To hold, as did the lower Courts, that under such circumstances not only is the legal presumption of the presence of invention rebutted, but so conclusively overcome as to permit of the entry of *judgment non obstante veredicto* even in the face of a substantial body of uncon-

tradicted testimony of recognized probative value also independently indicating presence of invention, is to deprive such legal presumption of all practical meaning.

Point 3: a) Rule 50-b does *not* enlarge the trial Judge's powers to over-ride the jury's fact-finding implied in its verdict, and

b) where both unrebutted legal presumption as well as a substantial body of uncontradicted evidence of acknowledged probative value support verdict, entry of *judgment non obstante veredicto* is a violation of the Seventh Amendment to the Constitution.

Before proceeding with the main argument on *Point 3-adb* (directed to questions 3-a and 3-b set forth on foregoing pages 12 and 13), we wish to call attention to the authorities recognizing the cogency and the probative value of the several branches of testimony and other evidence adduced on behalf of petitioner, to which testimony and evidence specific reference has been made on foregoing pages 26 to 28 hereof;—all of which not only confirms the Patent Office's prior quasi-judicial fact-finding of invention but also clearly supports the jury's concurrent fact-finding of invention implied in its verdict.

**Authorities accord petitioner's uncontradicted proofs
overwhelming probative weight**

*(for references to the Record,
for the hereinbelow indicated testimony and evidence,
see foregoing pages 26 to 28*

The uncontradicted testimony and other evidence in the case adduced on behalf of petitioner, including the testimony of respondent's alter ego and including respondent's admissions, established, without any contradiction, each of the following earmarks of invention, which have long been

recognized by courts as confirming the legal presumption of invention flowing from the grant of the patent and as supporting a verdict favorable to the patent-in-suit (or as supporting a Judge's fact-finding of invention where the case is tried by Judge without jury):

a) The uncontradicted expert testimony that it would *not* be obvious to those skilled in the art, to produce the construction of the patent-in-suit, even if they had before them all the "prior-art" patents relied upon. The probative value of such testimony and the requirement of its submission, to the jury, are recognized in the following decisions:

Bischoff et al vs Wethered 76 U. S. 812; 19 L. Ed. 829:

"It is, undoubtedly, the common practice of the United States Circuit Courts, in actions at law, on questions of priority of invention, where a patent under consideration is attempted to be invalidated by a prior patent, to take the evidence of *experts* as to the nature of the various mechanisms or manufactures described in the different patents produced, and as to the identity or diversity between them; and to submit all the evidence to the *jury* under general instructions as to the rules by which they are to consider the evidence."

Galloway vs U. S. 319 U. S. 372, 396; 87 L. Ed. 1458:

"That guaranty (of the Seventh Amendment to the Constitution) requires that the jury be allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them. It permits *expert opinion* to have the force of fact when based on facts which sustain it."

See also to like effect:

Keyes vs Grant 118 U. S. 25; 30 L. Ed. 54, 58

U. S. vs Esnault-Pelterie 303 U. S. 26, 31; 82 L. Ed. 625, 629

Webster Loom Co. vs Higgins 105 U. S. 580; 26 L. Ed. 1177, 1179, 1180

b) The unfavorable results (in the hands of the ultimate user) of the devices of the "prior-art" patents when formerly marketed, and the practical superiority of the construction of the patent-in-suit both in regard to the greater ease of use and in regard to the end-results produced by the device and production-economies flowing from the construction of the patent-in-suit both in regard to the on to the ultimate consumer) are recognized as having distinct probative value:

Minerals Separation Ltd. vs Hyde 242 U. S. 261, 270;
61 L. Ed. 287, 293:

"The record shows not only that the process in suit was promptly considered by the patentees as an original and important discovery, but that it was immediately generally accepted as so great an advance over any process known before that, without puffing or other business exploitation, it promptly came into extensive use for the concentration of ores in most, if not all, of the principal mining countries of the world, notably in the United States, Australia, Sweden, Chile, and Cuba, and that, because of its economy and simplicity, it has largely replaced all earlier processes. This, of itself, is *persuasive evidence of that invention* which it is the purpose of the patent laws to reward and protect. *Diamond Rubber Co. v. Consolidated Rubber Tire Co.* 220 U. S. 428, 55 L. ed. 527, 31 Sup. Ct. Rep. 444; *Carnegie Steel Co. v. Cambria Iron Co.* 185 U. S. 403, 429, 430, 46 L. ed. 968, 983, 22 Sup. Ct. Rep. 698; *Barbed Wire Patent (Washburn & M. Mfg. Co. v. Beat Em All Barbed Wire Co.)* 143 U. S. 275, 36 L. ed. 154, 12 Sup. Ct. Rep. 443, 450; *Smith v. Goodyear Dental Vulcanite Co.* 93 U. S. 486, 23 L. ed. 952."

See also to like effect:

Goodyear Tire & Rubber Co. vs Ray-O-Vac 321 U. S. 279; 88 L. Ed. 473, 476, 477

e) The admission of the confessed infringer (who was one skilled in the art, having had many years of prior practical experience in the field) that she preferred the construction of the patent-in-suit (against those of the "prior-art") because it was the easiest to use and most effective and because she "thought it was the best" and infringer's admission of her deliberate copying of the device of the patent-in-suit, has great probative value under the authorities:

Judelson vs Hill 18 Fed. (2d) 594, 598

"Where a patent has been substantially copied, the court should not be too astute to upset that patent . . ."

Also:

Forestek vs Knapp-Monarch Co. 106 Fed. (2d) 554, 558, 559 (CCA 6):

"Appellant paid its tribute to the utility of appellee's device by discontinuing the use of the now claimed anticipating appliances and adopting appellee's. *Diamond Rubber Co. v. Consolidated Tire Company*, 220 U. S. 428, 441, 31 S. Ct. 444, 55 L. Ed. 527.

One of the well-recognized rules in determining patentability is the utility of a substitution. *Smith & Co. v. Goodyear Dental Vulcanite Company*, 93 U. S. 486, 495, 23 L. Ed. 952."

d) Infringer's seeking of an improvement patent on the device admittedly copied from the patent-in-suit is of great probative value:

General Knit Fabric Co. vs Steber 194 Fed. 99, 101 (CCA 2):

"The defendants are not in a position to deny that the Scott patent discloses both novelty and invention in view of the fact that the defendant Steber, in March, 1910, received a patent for a knitted fabric which contains all the prominent features of the complainants'

fabric, and differs only in details which do not alter its usefulness or its appearance. In other words, one who receives a patent for the Steber fabric in 1910 is hardly in a position to deny patentability to the Scott fabric of 1908."

See also to like effect:

Russell vs Seeburg 123 Fed. (2d) 509, 512 (CCA 7)

Sugar Apparatus Mfg. Co. vs Yaryan 43 Fed. 140, 144 (C. C. E. D. Pa.)

Steel Protected Concrete Co. vs Central Improvement & Contracting Co. 155 Fed. 279, 285 (C. C. La.)

e) Commercial success and wide public acceptance of the hair-curler of the patent-in-suit, recognized as evidence entitled to weight in determining the question of invention.

Goodyear Tire & Rubber Co. vs Ray-O-Vac 321 U. S. 279, 88 L. Ed. 475, 477:

"Once the method was discovered it commended itself to the public as evidenced by marked commercial success. These factors were entitled to weight in determining whether the improvement amounted to invention and should, in a close case, tip the scales in favor of patentability." (citing *Smith vs Goodyear Dental Vulcanite Co.* 93 U. S. 486, 495, 496; 23 L. Ed. 952, 954, 955; *Magowan vs New York Belting & Packing Co.* 141 U. S. 332, 343, 35 L. Ed. 781, 785, 12 S. Ct. 71; *Topliff vs Topliff* 145 U. S. 156, 163, 164, 36 L. Ed. 658, 661, 662, 12 S. Ct. 825; *Keystone Mfg. Co. vs Adams* 151 U. S. 139, 143, 38 L. Ed. 103, 104, 14 S. Ct. 295; *C. & A. Potts & Co. vs Creagar* 155 U. S. 597, 609, 39 L. Ed. 275, 279, 15 S. Ct. 194; *Minerals Separation vs Hyde* 242 U. S. 261, 270, 61 L. Ed. 286, 293, 37 S. Ct. 82; *Smith vs Snow* 294 U. S. 1, 7, 14 79 L. Ed. 721, 725, 729, 55 S. Ct. 279; *Paramount Publix Corp. vs American Tri-Ergon Corp.* 294 U. S. 464, 79 L. Ed. 997, 1003, 55 S. Ct. 449).

Point 3-a&b:

Uncontradicted evidence of invention, plus legal presumption of invention, and the absence of any pertinent "prior-art" other than that considered by the Patent Office, and the absence of even a scintilla of other evidence against invention or against the jury's fact-finding thereof, bars trial Judge from re-examining and overriding the fact of "invention" found by the jury.

The Seventh Amendment to the Constitution requires, and it is the established rule, that if there is substantial evidence supporting the jury's verdict, or if the evidence for and against the jury's verdict is such that reasonable men could differ as to the conclusions to be drawn therefrom, then the question is one for the jury to determine and, in such a case, facts found by the jury, as implied in its verdict, cannot be re-examined and cannot be over-ridden by judgment *non obstante veredicto*.

Slocum vs N. Y. Life Ins. Co. 228 U. S. 364, 398, 399;
57 L. Ed. 879, 894

Pedersen vs Delaware 229 U. S. 146; 57 L. Ed. 1125,
1128

Berry vs U. S. 312 U. S. 450; 85 L. Ed. 945

Halliday vs U. S. 315 U. S. 94, 95, 96; 86 L. Ed. 711, 715,
716

Duncan vs Montgomery Ward & Co. 108 Fed. (2d) 848,
851 (CCA 8)

Montgomery Ward & Co. vs Duncan 311 U. S. 243, 245,
246; 85 L. Ed. 147, 150

Cranston vs B. & O. R. Co. 109 Fed. (2d) 630, 634
(CCA 3)

Hornin vs Montgomery Ward & Co. 120 Fed. (2d) 500,
502 (CCA 3)

Shewmaker vs Capital Transit Co. 143 Fed. (2d) 142,
143, 144 (App. D. C.)

Adams vs U. S. 116 Fed. (2d) 199, 200 (CCA 7)

McCoy vs Moore 140 Fed. (2d) 699, 700 (App. D. C.)

- Worcester vs Pure Torpedo Co.* 140 Fed. (2d) 358, 359, 361 (CCA 7)
Goodall Co. vs Sartin 141 Fed. (2d) 427, 432 (CCA 6)
Brunswick-Balke-Collender Co. vs Foster 141 Fed. (2d) 882, 884 (CCA 6)
Lucademo vs Hartford Co. 142 Fed. (2d) 154, 156 (CCA 3)
Simmonds vs Capitol Transit Co. 147 Fed. (2d) 570;
8 Fed. Rules Serv. 50 b. 31, Case 2 (App. D. C.),
decided Feb. 19, 1945

The question on appeal is not whether there was any substantial evidence to support the trial Judge's opinion or decision over-riding the jury's verdict (as the Court below seemingly thought, in mistaken reliance upon this Court's decision in Baldwin vs Redman, infra) but whether there was any substantial evidence to support the jury's verdict:

- Halliday vs U. S.* 315 U. S. 94, 95, 96; 86 L. Ed. 711, 715, 716
Montgomery Ward & Co. vs Duncan 311 U. S. 243, 245, 246; 85 L. Ed. 147, 150
Shewmaker vs Capital Transit Co. 143 Fed. (2d) 142, 143, 144 (App. D. C.)
Adams vs U. S. 116 Fed. (2d) 199, 200 (CCA 2)

The case at bar presents, in bold relief, the plain and unmistakable substitution of the trial Judge's opinion, for a prior administrative tribunal's (the Patent Office's) and the jury's concurrent fact-findings of invention, in a situation where there was also substantial evidence of recognized probative value to support the jury's verdict;—in clear violation of the Seventh Amendment to the Constitution.

Indeed, the case at bar presents the much stronger and more unusual situation (not present in any of the cited cases),

where the uncontradicted testimony and other evidence adduced on behalf of petitioner had recognized

probative value under all authorities *as supporting the jury's verdict* and was overwhelmingly in support of the jury's verdict and

where an unrebutted legal presumption also supported the verdict, and

where, indeed, there was *not a scintilla of relevant evidence against the jury's verdict* (or to support the Judge's post-trial opinion of "non-invention") other than the prior patents in respect to which the Patent Office had adjudged the device of the patent-in-suit to be inventive, plus a grist of other "prior-art" patents which the trial Judge, throughout the trial, had regarded "*not anywhere near the patent*" in suit and "*a waste of time*" to consider, and in respect to which grist of other prior patents, the trial Judge shut off petitioner's rebuttal because he concluded that this grist of other prior patents was irrelevant.

This Court held in *Gunning vs Cooley* 281 U. S. 90, 94; 74 L. Ed. 720, 721, that in determining any motion which would remove from the jury the determination of a fact-question,

"The court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them"

and that

"Where uncertainty as to the existence (of a fact) arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury."
(281 U. S. 94)

The Court below misinterpreted this Court's decision in *Baldwin & Carolina Inc. vs Redman* (295 U. S. 654) and, as shown hereinbelow under *Point 3-c*, the Court below misinterpreted Rule 50-b to give the trial Judge power to override the jury's verdict regardless of the overwhelming weight of evidence supporting such verdict. That the lower Court erred, in this regard, is evident from this Court's still more recent decision in *Berry vs U. S.* 312 U. S. 450, 453 (85 L. Ed. 945, 947), in which this Court said:

"Rule 50(b) goes further than the old practice²⁹ in that district judges, under certain circumstances, are now expressly declared to have the right (but not the mandatory duty) to enter a judgment contrary to the jury's verdict without granting a new trial. *But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact*³⁰—*a jury being the constitutional tribunal provided for trying facts in courts of law.* Here, although there was evidence from which a jury could have reached a contrary conclusion, there was testimony from which a jury could have found these to be the facts." (setting forth the facts which the jury could have found)

The foregoing decision of this Court was made in full recognition of this Court's earlier decisions in *Slocum vs N. Y. Life Ins. Co.* 228 U. S. 364, and *Baltimore vs Redman* 295 U. S. 654. The Circuit Court of Appeals, in the case at bar, erroneously interpreted *Baltimore vs Redman, supra*, in effect, to permit the substitution of the Judge's opinion for the jury's fact-finding regardless of what the evidence may be supporting the verdict, because, in the case at bar,

29) Compare *Slocum v. New York L. Ins. Co.*, 228 U. S. 364, 57 L. ed. 879, 33 S. Ct. 523, Ann. Cas. 1914D 1029, with *Baltimore & C. Line v. Redman*, 295 U. S. 654, 79 L. ed. 1636, 55 S. Ct. 890.

30) See *Gunning v. Cooley*, 281 U. S. 90, 94, 74 L. ed. 720, 724, 50 S. Ct. 231; *Richmond & D. R. Co. v. Powers*, 149 U. S. 43, 45, 37 L. ed. 642, 643, 13 S. Ct. 748; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 606, 36 L. ed. 820, 833, 12 S. Ct. 905; *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 657, 663, 21 L. ed. 745, 749.

the jury's verdict is supported both by the prior fact-finding of a quasi-judicial administrative tribunal, the correctness of which prior fact-finding has, under the authorities, not even been successfully rebutted, and is also supported by six branches of uncontradicted testimony and other evidence of recognized probative value, also independently supporting the verdict.

In respect to *Question No. 3* (a & b) presented on foregoing pages 12 and 13 of the Petition, it is respectfully submitted that the entry of *judgment non obstante veredicto*, in the case at bar, clearly deprives petitioner of the benefit of the trial by jury and of the immunity from re-examination of a fact found by a jury, in violation of the Seventh Amendment to the Constitution and in violation of Section 770 of Title 28 of the United States Code which implements that Amendment, because

a) under the authorities cited on foregoing pages 41-46 as to the legal presumption of the presence of invention, flowing from the grant of the patent, and as to the heightened legal presumption flowing from the fact that the Patent Office had considered the same "prior-art" patents which are relied upon in defense of the patent-in-suit, respondent's proof³¹ have *not* even neutralized the legal presumption of the presence of invention in the patent-in-suit (even disregarding petitioner's proofs confirmatory of the presence of invention) and

b) the unrebutted legal presumption of the presence of invention was further supported by evidence of many kinds indicative of invention, recognized by courts, which evidence was *not* contradicted, and

c) the decision of the Circuit Court of Appeals sustaining the *judgment non obstante veredicto* was based exclusively upon the Godward patent to which petitioner had called the Patent Office's attention and which the Patent

31) consisting, as they do, merely, of copies of prior patents, without a word of testimony or other evidence.

Office had specifically considered and the Anderton patent on a non-analogous (R.46) device as to which even the trial Judge had differed, 40 days prior to the entry of *judgment non obstante veredicto*, when he said that such Anderton patent is "*not anywhere near the patent*" in suit and "*a waste of time*" to consider;— so much so that he, in effect, declined to receive testimony in rebuttal thereof on the apparent ground that it was too remote to warrant rebuttal.

Rule 50-b did not enlarge the powers of the trial Judge so as to enable him to over-ride the jury's fact-finding implied in the verdict (or to take away from the jury the determination of a fact-question, by directing verdict).

That Rule 50-b did not intend so to enlarge the trial Judge's powers, in this regard, beyond what his powers were at common law and beyond what his powers were prior to the new Rules of Civil Procedure for the District Courts of the United States, is evident both from the safeguards expressly written into Rule 50-a and Rule 50-b (limiting Rule 50-b to "legal questions" raised by a prior motion for directed verdict, which by Rule 50-a is required to "state the *specific* grounds therefor"), and is also shown by the following decisions:

Berry vs U. S. 312 U. S. 450; 89 L. Ed. 945

Conway vs O'Brien 312 U. S. 492; 85 L. Ed. 969

Halliday vs U. S. 315 U. S. 94, 95, 96; 86 L. Ed. 711, 715

Virginia-Carolina Co. vs Dunbar 106 Fed. (2d) 383,
385 (CCA 4)

Duncan vs Montgomery Ward & Co. 108 Fed. (2d) 848,
851 (CCA 8)

Montgomery Ward & Co. vs Duncan 311 U. S. 243, 245,
246; 85 L. Ed. 147, 150

Neither this Court's decision in *Baltimore vs Redman*, supra, nor new Rule 50-b, should be held to be authority for the entry of *judgment non obstante veredicto* where the trial Judge, throughout the trial and in his charge to the jury, had discredited the evidence against the verdict and had given clear recognition to the evidence supporting the

verdict, and where the Judge, after the verdict, apparently changed his personal evaluation of the evidence for and against the verdict. Such a change of mind could not justify the entry of *judgment non obstante veredicto* because it at least affirmatively shows that reasonable men could differ as to the evaluation of, or conclusions to be drawn from the evidence;— particularly where, as in the case at bar, the trial Judge had been so firmly convinced of the lack of probative value of the evidence against the verdict that he openly discouraged rebuttal thereof on the ground that such rebuttal was not necessary (R.25-26).

Therefore, the case at bar is one which should be governed by this Court's decision in *Berry vs U. S.* 312 U. S. 450, 453, and the judgment and decision below should be reversed as a violation of the Seventh Amendment to the Constitution and as a violation of Section 770 of Title 28 of the United States Code.

The record in the case at bar so plainly shows that the evidence presented a fact-question within the sole province of the jury, that, unless the lower Court's decision is reviewed and reversed, the right of trial by jury and the immunity from re-examination of the fact found by a jury, will remain so seriously impaired that these constitutional guarantees will not be a matter of right but will be merely a matter resting within the whim of the trial Judge.

Point 3-c: Respondent's earlier-denied motion to direct verdict did *not* state any "specific grounds" within the meaning of Rule 50-a raising a "legal question" within the meaning of Rule 50-b, and there was no "legal question" reserved by Rule 50-b for "later determination" upon the denial of respondent's motion to direct verdict, and, hence, respondent's motion to set aside verdict and for judgment n. o. v. was not based on any "legal question" within the meaning of Rule 50-b.

Respondent's motion (R.43) to set aside verdict and to enter judgment notwithstanding the jury's verdict, should have been denied because it was not based upon any "legal question" raised by respondent's earlier-denied motion to direct verdict (R.42) within the meaning of Rule 50-b, and because neither this motion for judgment n. o. v. (R.43) nor respondent's underlying (earlier-denied) motion to direct verdict (R.42) stated any "specific grounds" as required by Rule 50-a for raising a "legal question" within the meaning of Rule 50-b.

Respondent's motion to direct verdict (R.42) was based on two grounds, namely:

- a) that the device of the patent-in-suit was "old" or "anticipated by the prior-art", and
- b) that the device of the patent-in-suit did "not amount to invention" or was "lacking in invention over the prior-art in evidence".

The first of these grounds, namely that the device of the patent-in-suit is old or anticipated by the prior-art, was not only denied by the trial Judge upon his denial (R.35) of respondent's motion to direct verdict (R.42) but was also *denied* by the trial Judge upon his consideration of respondent's motion to set aside verdict and for judgment n. o. v. (R.43), as evidenced by the fact that upon the signing of the Order for judgment n. o. v. (R.47) prepared and submitted by respondent's counsel, the trial Judge struck from respondent's form of such order, ground "a" above, namely, struck from such order the statement that the device of the patent-in-suit was either "old" or "anticipated by the prior-art".

The Circuit Court of Appeals for the Third Circuit did *not* disturb the trial Judge's continued adherence to his original conclusion reached at the trial (R.37-38), that the device of the patent-in-suit was *not* anticipated by any of the "prior-art" patents, namely, that *none* of them showed the same construction as that of the patent-in-suit, and that

the device of the patent-in-suit was both new and useful (R.37-38).

Therefore, the question whether this ground ("a", above), upon which, *inter alia*, respondent based both its (denied) motion to direct verdict (R.42) and its subsequent (granted) motion for judgment notwithstanding the verdict (R.43), could possibly be construed as having presented a "legal question" within the meaning of Rule 50-b, is wholly moot and need not be considered because *that ground ("a") was uniformly denied and rejected by the trial Judge, both before and after the verdict, and such denial was not disturbed by the Circuit Court of Appeals.*

The *only* other ground ("b", above) raised by respondent's motion to direct verdict (R.42) was "non-invention", or, that the device of the patent-in-suit did "not amount to invention" or was "lacking in invention over the prior-art in evidence".

This ground ("b"), included (by reference) in respondent's motion to set aside the verdict (R.43), does not *in reality* raise any "legal question" within the meaning of Rule 50-b, because, as pointed out hereinabove, under Points 1 and 2 of the Argument, the presence or absence of invention, particularly where the prior-art *admittedly* does *not* disclose the same construction as that of the patent-in-suit, is a question of fact, and not a "legal question".

Thus, the part "b", above of respondent's motion to direct verdict (R.42), upon which (*the granted part of*) its motion for judgment n. o. v. (R.43) is predicated (*the only part sustained by either of the Courts below*), raised a pure question of fact, and not a question of law.

The only other ground for respondent's motion (R.43) for judgment notwithstanding the verdict is the very general statement that the verdict is "contrary to the law and the evidence".

However, as Rule 50-b makes a judgment notwithstanding the verdict dependent upon a prior denied motion for directed verdict, under Rule 50-a which *must* "state the

specific grounds therefor", it necessarily follows that such a broad sweeping statement as that verdict is "contrary to the law and the evidence" adds nothing to respondent's earlier-denied motion to direct verdict (R.42) which was *bare* of any "legal question" and is *not*, in any event, a statement of "specific grounds" required by Rule 50-a.

As stated in Moore's Federal Practice (Vol. 3, 1943 Supp. p. 86):

"A motion for a directed verdict must state the specific grounds therefor, and a motion which presents a question of fact, rather than a question of law, is insufficient."

Respondent's motion to direct verdict (R.43) did *not* say that, *as a matter of law*, the ~~patent-in-suit~~ is invalid, as, for instance, on the ground that the thing patented thereby was neither an "art", nor a "machine" nor a "manufacture" within the meaning of R. S. 4886 (35 USC 31), as was done in *Park-In vs Rogers* 130 Fed. (2d) 745 (CCA 9) on motion for summary judgment.

Therefore, the granting (R.47) of respondent's motion to set aside the jury's verdict and for the entry of judgment n. o. v. (R.43), was *not* based upon any "legal question" under Rule 50-b raised by any prior-denied motion for directed verdict setting forth "specific grounds" therefor, as required by Rule 50-a, and the decisions of the Courts below are necessarily in conflict with the following decisions of other Circuits:

In *Virginia-Carolina Co. vs Dunbar* 106 Fed. (2d) 383, 385 (CCA 4), the Court, in affirming the trial Court's refusal to direct a verdict, stated:

"The first question does not properly arise upon the record; for, although plaintiff's counsel did move for a directed verdict and excepted to the refusal of the court to grant same, the record does *not* show that they stated any grounds of motion, as expressly required by rule 50(a) of the Rules of Civil Procedure,

28 U. S. C. A. following section 723c. . . . And we think it *important that this requirement of the rule be observed*, particularly in view of the enlarged powers granted by the court with respect to such motions by rule 50(b), *as otherwise judgment might be entered on such a motion after the close of the trial and on a ground which could have been met with proof if it had been suggested when the motion was made.*"

In *Duncan vs Montgomery Ward & Co.* 108 Fed. (2d) 848, 851 (CCA 8) the Court stated:

"Rule 50(a) of the Rules of Civil Procedure provides that '*A motion for a directed verdict shall state the specific grounds therefor.*' Of the grounds of the motion for a directed verdict in this case the fifth is the only one which specifically refers to the alleged negligent act of Jake Jackson, and it does not present a question of law calling for the decision of the court. It charges that the 'plaintiff has failed to prove by a preponderance of the evidence that he was injured in the manner alleged', etc. *The matter of the 'preponderance of the evidence' is a jury question, and not a law question*'".

This Court, in *Montgomery Ward vs Duncan* 311 U. S. 243, 245, 246; 85 L. Ed. 147, 150, in modifying on *other* grounds, the last above-quoted decision of the 8th Circuit, characterized the reasons presented in support of the motions (for judgment n. o. v. and for a new trial) as follows:

"Four (of the nine grounds) challenged the sufficiency of the evidence as to negligence, as to the existence of the employment relation, and as to assumption of risk, to support the verdict. One dealt with *the preponderance of the evidence* and was therefore *inappropriate in support of the motion*". (311 U. S. 245, 246)

Indeed, this Court, in *Montgomery Ward vs Duncan* 311 U. S. 243, necessarily approved the Circuit Court of Appeals' (CCA 8) reversal of the trial court's judgment notwithstanding verdict in that case, because, had this Court not, in fact, approved such reversal of the judgment notwithstanding the verdict, there would obviously have been no occasion to remand the case for the consideration of the alternative motion for new trial.

Therefore, the decision of the Circuit Court of Appeals for the Third Circuit, in the case at bar, is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Duncan vs Montgomery Ward* 108 Fed. (2d) 848, and, indeed, with the decision of this Court in *Montgomery Ward vs Duncan* 311 U. S. 243, as well as with the decision of the Fourth Circuit in *Virginia-Carolina vs Dunbar*, *supra*, on the question as to what is a "legal question" under Rule 50-b and what is a sufficient statement of "specific grounds" therefor under Rule 50-a.

The case at bar brings into bold relief the importance of the requirement of Rule 50-b that the motion for directed verdict shall raise a "legal question" and the requirement of Rule 50-a that such motion "shall state the specific grounds therefor" because, as pointed out by the Circuit Court of Appeals for the Fourth Circuit in *Virginia-Carolina Co. vs Dunbar*, *supra*,

"Otherwise judgment might be entered on such motion after the close of the trial and on a ground which could have been met with proof if it had been suggested when the motion was made";

This has forceful application to the case at bar, because that is precisely what was done in the case at bar;—and had respondent's motion to direct verdict (R.42) stated true "specific grounds" (as required by Rule 50-a), petitioner could (and would) have met such "specific grounds" by further testimony or other evidence (which petitioner was fully prepared to do).

Thus, for example, *had* respondent's (earlier-denied) motion to direct verdict (R.42) stated, as "specific grounds", that the patent-in-suit is invalid

because of the prior *Anderton patent* (which the trial Judge had theretofore discredited: R.25-26)

and/or

because the mechanism ³² of the *Anderton patent* "permeated practically every art" (as was 40 days later arbitrarily concluded by the trial Judge, after the verdict, without any evidence in the record to support such conclusion: R.46),

petitioner would have met such "specific grounds" by the rebuttal testimony which petitioner had tendered and which the trial Judge had shut off by his clear statement (during the testimony) that petitioner should not "bother with" the Anderton patent (nor with the grist of some 15 other prior patents relied upon) because "they are not anywhere near the patent" in suit and because they are "a waste of time" to consider (R.25-26).

It is this very situation which Rule 50 was intended to safeguard against, by requiring

in part "a" thereof, that the motion for directed verdict shall "state the *specific grounds* therefor",
and

in part "b" thereof, that the motion for directed verdict must have raised a "*legal question*" in order that its denial may be "subject to" (or with the reservation of) the "later determination" of such "*legal question*", on a motion for judgment notwithstanding the verdict.

With these two safeguards disregarded and rendered meaningless, as was done by the Courts below, in the case at bar, Rule 50-b inevitably becomes a free instrument for the deprivation of the benefits of right of trial by jury and

32) see footnote 26, *supra* (on page 36)

of the immunity from re-examination of the fact found by a jury, and so comes into conflict with the Seventh Amendment to the Constitution of the United States (and with Section 770 of Title 28 of the United States Code which implements it).

- Point 4:** (a) judgment non obstante veredicto³³ may not be entered (or sustained) in reliance upon evidence which the trial Judge had, throughout the trial, regarded so irrelevant as for that reason to decline to receive testimony in rebuttal thereof, and evidence which he influenced the jury to disregard, and
- (b) the fact that the trial Judge so regarded such evidence, throughout the trial, and influenced the jury to disregard it, ipso facto, shows that the evidence was such that reasonable men could differ as to the conclusions to be drawn therefrom and such as to place the determination within the sole province of the jury.

This case presents novel and important questions of Federal law, particularly *Questions 4-a and 4-b* set-forth on foregoing page 15 hereof, which have not been but should be settled by this Court in order to keep Rule 50-b in harmony with the Seventh Amendment to the Constitution.

These questions are novel because, so far as we have been able to find, in no reported case (prior to or since the case at bar) has any Federal Court attempted to override³³ the jury's fact-finding implied in its verdict, in reliance upon evidence which the trial Judge had, throughout the trial, regarded so irrelevant as for that reason to decline to receive testimony in rebuttal thereof and which evidence he influenced the jury to disregard.

33) for asserted insufficiency of the evidence to support the verdict

This raises the important questions going to Rule 50-b and the Seventh Amendment to the Constitution:

- a) whether *judgment non obstante veredicto*³³ may be entered in reliance upon evidence which, throughout the trial, the trial Judge regarded so irrelevant as for that reason to decline to receive testimony in rebuttal thereof, and which evidence he influenced the jury to disregard, and
- b) whether the fact that the trial Judge so regarded such evidence, throughout the trial, does not, ipso facto, show that the evidence was at least such that reasonable men could differ as to the conclusions to be drawn therefrom and, therefore, such as to make the case clearly one within the sole province of the jury to determine?

We respectfully submit that the rationale of the Seventh Amendment and of Rule 50-b (and of the above-cited authorities under Points 3-a&b and 3-c) is

that *judgment non obstante veredicto*³³ may not be entered (or sustained) in reliance upon evidence which the trial Judge had, throughout the trial, regarded so irrelevant as for that reason to decline to receive testimony in rebuttal thereof and as to influence the jury to disregard it, and

that where the trial Judge can so regard the evidence throughout the trial, and then reach a different and incompatible conclusion, 40 days later, the evidence was necessarily one on which reasonable men could differ as to the conclusions to be drawn from the evidence, and that, therefore, the evidence was necessarily such as to place the determination of the case within the sole province of the jury.

33) for asserted insufficiency of the evidence to support the verdict

We further respectfully submit that these questions are so plainly and unmistakably presented in the case at bar, that unless the decision below be reviewed and corrected by this Court, it will stand as an erroneous precedent and as one conflicting with the decisions of other Circuits and of this Court with respect to constitutional guarantees of the Seventh Amendment and the application of Rule 50-b to such guarantees, and will, indeed, leave a distinct chasm between Rule 50-b and the Seventh Amendment;—a result which, we respectfully submit, was not intended by the new Rules.

CONCLUSION

It is therefore respectfully submitted that the foregoing Petition for Writ of Certiorari be granted, and that a Writ of Certiorari of this Court be issued to the United States Circuit Court of Appeals for the Third Circuit, to the end that the decision and judgment of that Court, in the case at bar, be reviewed, and, upon review, reversed with directions to enter judgment in accordance with the jury's verdict—not only in order that petitioner may have justice, but also in order that the benefits of the right of trial by jury and of the immunity from re-examination of the fact found by a jury, be preserved intact, and that the errors of the Court below, so clearly violative of the Seventh Amendment to the Constitution, may not remain as a precedent.

Respectfully submitted,

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(21)

Office - Supreme Court, U. S.

FILED

MAY 3 1945

CHARLES ELMORE OROPLEY
CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1944.

No. 1161.

WENDELL J. CALEY,
Petitioner,

v.

RYAN DISTRIBUTING CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI.

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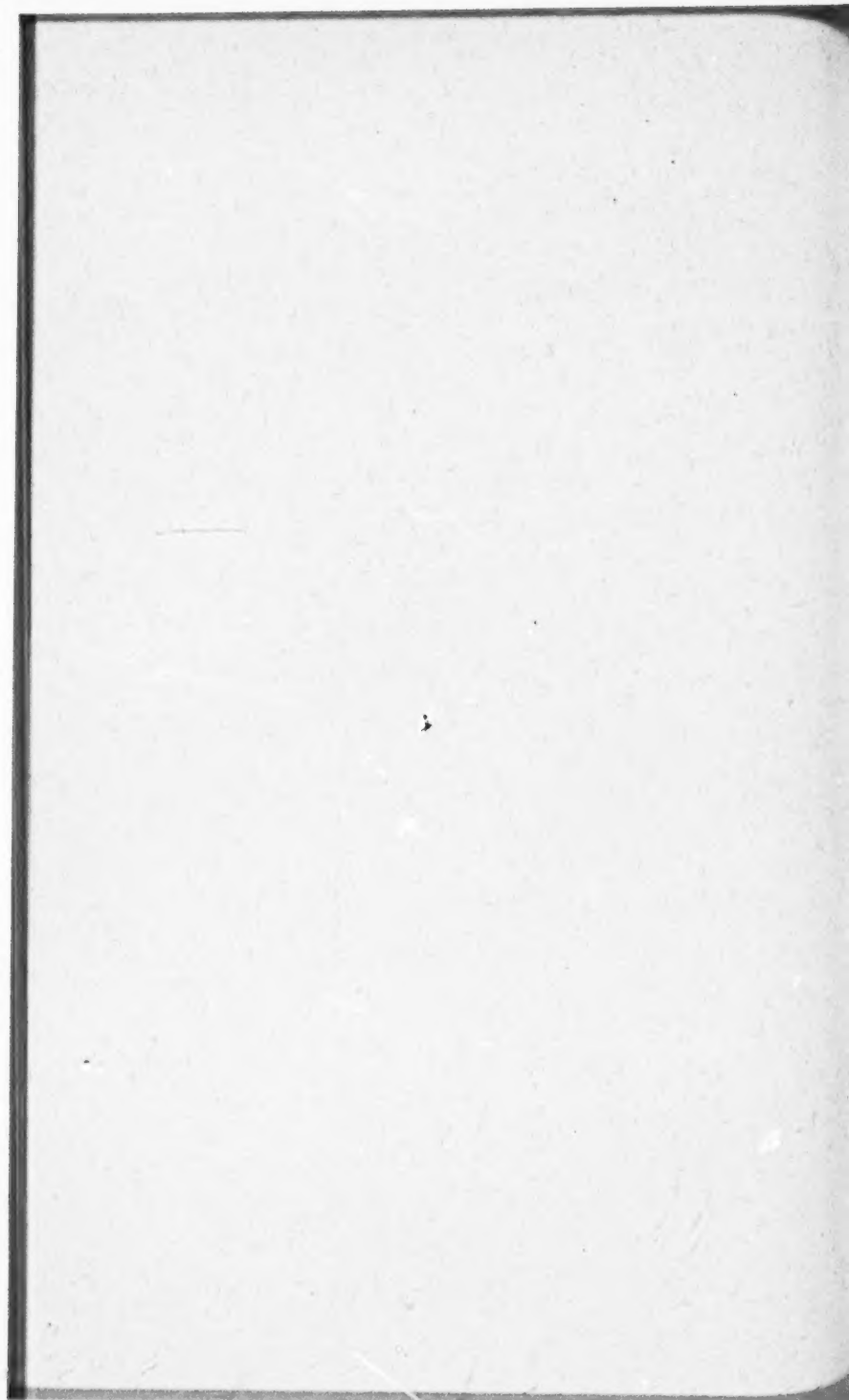


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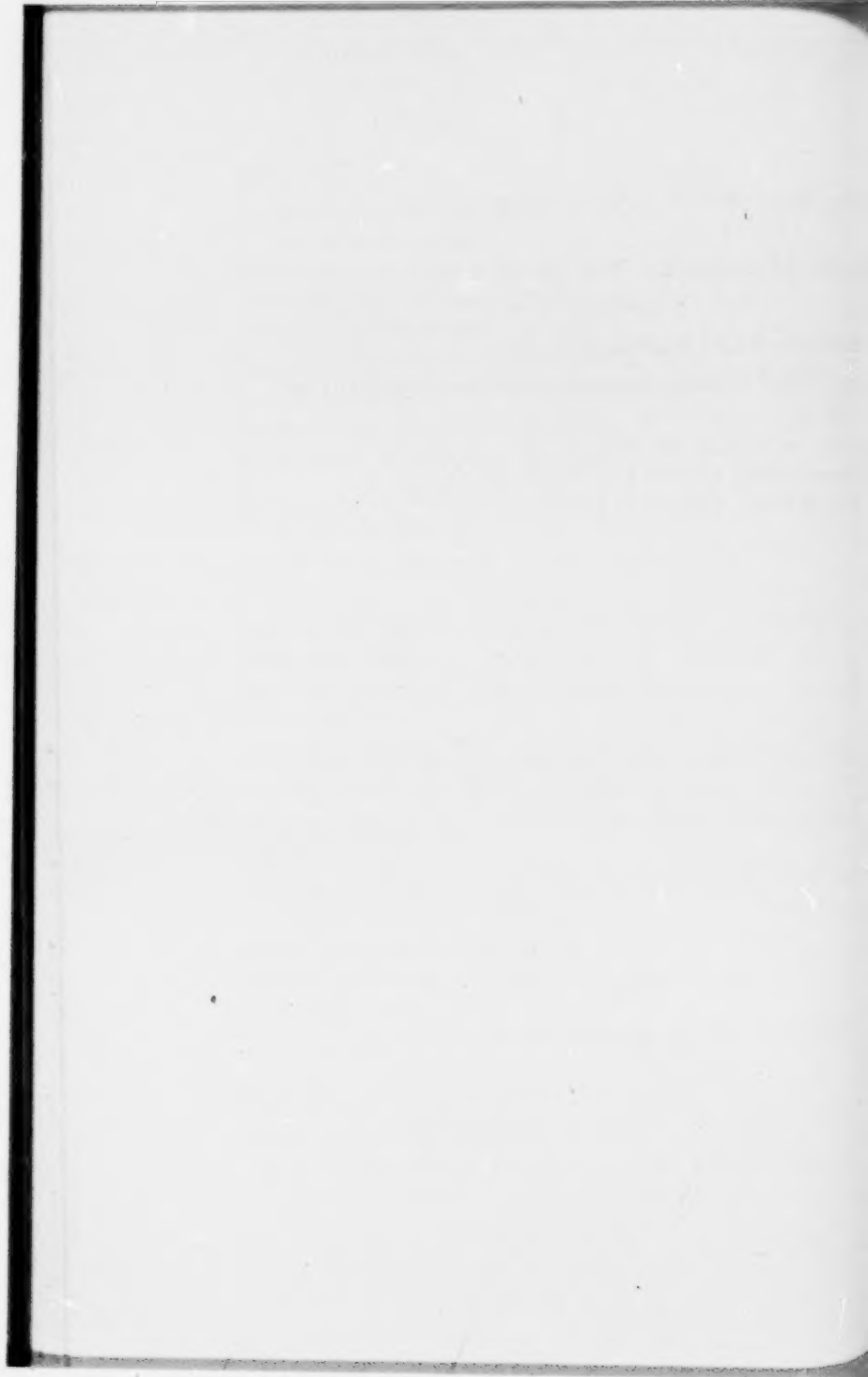
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**In the
Supreme Court of the United States.**

OCTOBER TERM, 1944.

No. 1161.

**WENDELL J. CALEY,
PETITIONER,**

v.

**RYAN DISTRIBUTING CORPORATION,
RESPONDENT.**

**BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI.**

I. STATEMENT OF THE CASE.

The facts and issues presented in this case are clearly and adequately stated by the Circuit Court of Appeals in its Opinion (R. pp. 54a-59a). The situation, briefly, was this:

Respondent Ryan Distributing Corporation brought an action against Petitioner Caley for a declaratory judgment that Caley patent No. 1,945,932 for a Hair Curler or Waver was invalid or not infringed. Caley counterclaimed for infringement of his patent, but limited his demand to damages, and demanded a jury trial on the issues raised by the Complaint and counterclaim. Respondent's Motion to Strike the Demand for Jury Trial, or in the alternative for Separate Trial on the complaint, was denied (R. pp. 4a-8a). The case was then tried before a jury, the District Court denying Respondent's Motion for Directed Verdict,

and the jury found the patent valid and infringed. The District Court then granted Respondent's Motion to Set Aside the Verdict, and judgment was entered finding the Caley patent invalid. The Court of Appeals affirmed.

The sole issue before the Court of Appeals was whether there was sufficient evidence in the case to support the jury's verdict of validity of the Caley patent. Secondly, the case involves the determination of the nature of the evidence necessary to support a finding of invention, as contrasted with the proofs of prior art practices which establish non-invention.

The device of the Caley patent, a Hair Curler or Waver, is extremely simple. As the Caley patent drawings (R. p. 49a) show, it comprises a flat strip of rubber or similar flexible material, having an elongated eye or slot at one end, and a notched head at the other end adapted to pass through the eye in quarter-turned (or 90°) position and to lock against the strip when turned to normal position.

An admittedly prior art construction is shown in Figs. 8 and 9 of the Caley patent (R. p. 49a) and comprised a similar flexible strip of rubber with a *circular* eye at one end and a *spherical* knob at the other end adapted to pass through the eye and to be locked therein. The reason for making Caley's change was "to make the buttoning of the head and eye ends together more easy by providing the head with flatness whereby the head may be inserted edgewise through the eye and then buttoned by turning back into its normal plane." (Caley patent, R. p. 50a, 11. 21-26.) The Caley curler, being stamped from sheet material, could also be made more cheaply than the prior molded rubber curler of Caley's Figs. 8 and 9.

Such a slight change of shape and form from the prior art is obviously within the competence of any skilled person and not invention. The Caley patent obviously does not

meet the standard of invention required by the decisions of this Court.

Cuno Engineering Corp. v. Automatic Devices Corp.,
314 U.S. 84 at 90 (1941).

Toledo Pressed Steel Co. v. Standard Parts Co., 307
U.S. 350 at 355-6 (1938).

Textile Machine Works v. Louis Hirsch Textile Ma-
chines, 302 U.S. 490 (1937).

Respondent's evidence establishing invalidity of the Caley patent for lack of invention consisted of the Caley patent itself, the file history of the Caley patent in the Patent Office, and a Book of Prior Art Patents. Except for the Caley patent, this evidence is not reproduced by Petitioner in the Transcript of Record before this Court, but the prior art patents are described in the Opinion of the Court of Appeals (R. p. 56a), and the Caley patent alone, with its showing of an admittedly prior construction, is sufficient to establish its own invalidity.

The Caley patent was obviously invalid for lack of invention. But the jury had found it valid and infringed. In that situation the District Court (Judge Kirkpatrick) very properly granted Respondent's Motion to Set Aside the Verdict, saying (R. p. 44a):

"It seems to me that it is so plain that invention does not exist, that it is the duty of the Court to so declare and the Court should have so instructed the jury."

The District Court acted according to the established rule that, when it is clearly apparent merely from the disclosure of the printed prior art that invention does not exist, and there are no disputed questions of facts depending upon the credibility of witnesses, then the question of existence of invention is determined by the Court as a matter of law.

Market Street Railway Co. v. Rowley, 155 U.S. 61 at 625 (1894).

Singer Manufacturing Co. v. Cramer, 192 U.S. 201 (1903).

Randall v. Baltimore & Ohio R. R. Co., 109 U.S. 475 (1883).

Brothers v. Lidgerwood Mfg. Co., 223 Fed. 301 (C.C.A. 2, 1915).

Connors v. Ormsby, 148 Fed. 13 (C.C.A. 1, 1906).

Fond du Lac County v. May, 137 U.S. 395 at 402 (1890).

Heald v. Rice, 104 U.S. 737 at 749 (1881).

Cochrane v. Deener, 94 U.S. 780 at 784 (1876).

Black Diamond Co. v. Excelsior Co., 156 U.S. 611 at 618 (1894).

Gunning v. Cooley, 281 U.S. 90 at 93-95 (1929).

As the Court of Appeals said in affirming (R. p. 55a):

"The Caley patent and those of the prior art are so extremely simple as to speak for themselves, so that the Court could determine from mere comparison what was the claimed invention described in each, and to decide from such comparison whether the articles described were or were not substantially the same."

II. PETITIONER'S EVIDENCE ALLEGEDLY SUPPORTING INVENTION.

Petitioner's evidence relied on to support the jury's verdict of validity was obviously wholly insufficient for that purpose, or to overcome Respondent's proofs conclusively establishing the invalidity of Caley's patent for lack of invention. Petitioner's evidence consisted of such as the following:

1. *The presumption of validity of the Caley patent arising from its grant by the Patent Office.* A presumption, or

course, has no weight as evidence itself, but is merely a rule of procedure imposing on the party against whom it operates, the duty of coming forward with evidence, and when that presumption is met by evidence to the contrary, the presumption disappears. Here Respondent fully rebutted the starting presumption of validity by conclusive proof of the patent's invalidity, as shown by the prior art patents, and Petitioner's starting presumption could not then be given weight as evidence in determining Petitioner's right to go to the jury.

New York Life Insurance Co. v. Gamer, 303 U.S. 161 at 171-2 (1937).

Connors v. Ormsby, 148 F. 13 at 14 (C.C.A. 1, 1906).

Luten v. Kansas City Bridge Co., 285 F. 840, 844 (C.C.A. 8, 1922).

Del Vecchio v. Bowers, 296 U.S. 280 at 286-7 (1935).

Reliance Life Ins. Co. v. Burgess, 112 F. (2d) 234 at 238 (C.C.A. 8, 1940).

Wigmore on Evidence (3rd Ed.) Sec. 2491 pp. 289-291.

Model Code of Evidence—*American Law Institute*, Rule 704 (1 and 2).

2. *The fact that Caley's Hair Curler has enjoyed commercial success.* When a patented device plainly lacks invention over the prior art, commercial success is, of course, wholly incapable of supplying patentability.

Textile Machine Works v. Louis Hirsch Textile Machines, 302 U.S. 490 at 498 (1937).

De Forest Radio Co. v. General Electric Co., 283 U.S. 664, 685 (1931).

Walker on Patents (Deller's Ed.) Sec. 44, pp. 234-236 and 241.

3. *The opinion of Petitioner's expert that the Caley pat-*

ent was valid and that Caley's changes constituted invention. A court or jury, of course, is not obliged to follow the conclusions of an expert and may disregard them, if they are unsound, or unreasonable, or unsupported by the evidence.

Walker on Patents (Deller's Ed.) p. 1211.

Overweight Elevator Co. v. Improved Order of Red Men's Hall Ass'n., 94 F. 155 (C.C.A. 9, 1899).

Farmers' Cooperative Exchange, Inc. v. Turnbourn, 111 F. (2d) 728 and 731 (C.C.A. 9, 1940).

4. *The economy and speed resulting from the production of the Caley Hair Curler, in being stamped out from a large sheet of rubber, rather than individually molded.* Even though the hair curler may be the product of a cheaper process of manufacture, that does not make the hair curler itself a new article of manufacture and hence patentable.

In Re Wood-Paper Patent, 23 Wall. 566 (1873).

Risdon Iron & Locomotive Works v. Medart, 158 U.S. 68, 83, 84 (1895).

Pfanzstiehl Chemical Co. v. American Platinum Works, 135 F. 2d 171 at 173 (C.C.A. 3, 1943).

5. *The fact that Mrs. Ryan, Respondent's Treasurer, once worked for the Petitioner Caley.* Such a fact, of course, is wholly immaterial in a patent infringement suit where the patentee's rights are dependent upon the validity of his own patent and its contribution to the art.

Paramount Publix Corp. v. American Tri-Ergon Corp., 294 U.S. 464, 476-7 (1935).

6. *The fact that Respondent made an admittedly infringing curler when it could have made a non-infringing curler.* Infringement is evidence of utility, but not of invention. In fact, infringement is more likely evidence of non-invention

where, as here, Respondent infringes the patent because convinced that the patent is invalid for lack of invention and was improperly granted by the Patent Office.

7. *The fact that Mrs. Ryan, Respondent's Treasurer, applied for a patent of her own somewhat similar to Caley's.* Such alleged estoppel by conduct obviously yields to the paramount public interest against the allowance of invalid patents.

Paramount Publix Corp. v. American Tri-Ergon Corp., 294 U.S. 464, 476-7, (1935).

Haughey v. Lee, 151 U.S. 282, 285 (1893).

Fowler v. Honorbilt Products, 131 F. 2d 153 (C.C.A. 3, 1942).

Floridian Co. v. Attapulugus Clay Co., 125 F. (2d) 669 (C.C.A. 2, 1942).

International Steel Wall Corp. v. Williams Co., 137 F. 2d 342 at 343 (C.C.A. 6, 1943).

The Court of Appeals thus correctly summarized the situation, we submit (R. p. 58a):

"The grant of the patent, the public acceptance of the article, its copying by plaintiff, plaintiff's seeking an improvement patent thereon, economy of production, expert testimony to the effect that it was not obvious to those skilled in the art, these are all evidence tending to show invention. But they do not conclusively indicate invention as defendant urges. Such evidence, when doubt exists, may resolve that doubt in favor of him who submits it, but where as here there is a clear-cut case of lack of invention such evidence cannot successfully controvert it."

III. ALLEGED DENIAL OF RIGHT TO JURY TRIAL

Petitioner finally argues that the action of the District Court in setting aside the jury's verdict of validity deprives Petitioner of his right to a jury trial guaranteed by the Seventh Amendment of the Federal Constitution. The contention is obviously unsound.

Galloway v. United States, 319 U.S. 372, 389 (1942).
Slocum v. New York Life Ins. Co., 228 U.S. 364-369 (1912).

Baltimore & Carolina Line Inc. v. Redman, 295 U.S. 654 (1934).

Rule 50b, Federal Rules of Civil Procedure.

Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940).

CONCLUSION.

We respectfully submit that the action of the District Court in setting aside the jury's verdict and entering judgment for Respondent, and the judgment of the Circuit Court of Appeals affirming the District Court, was correct and fully supported by the evidence of record herein, that the Petition presents no question requiring the exercise of this Court's discretionary jurisdiction, and should be denied.

Respectfully submitted,

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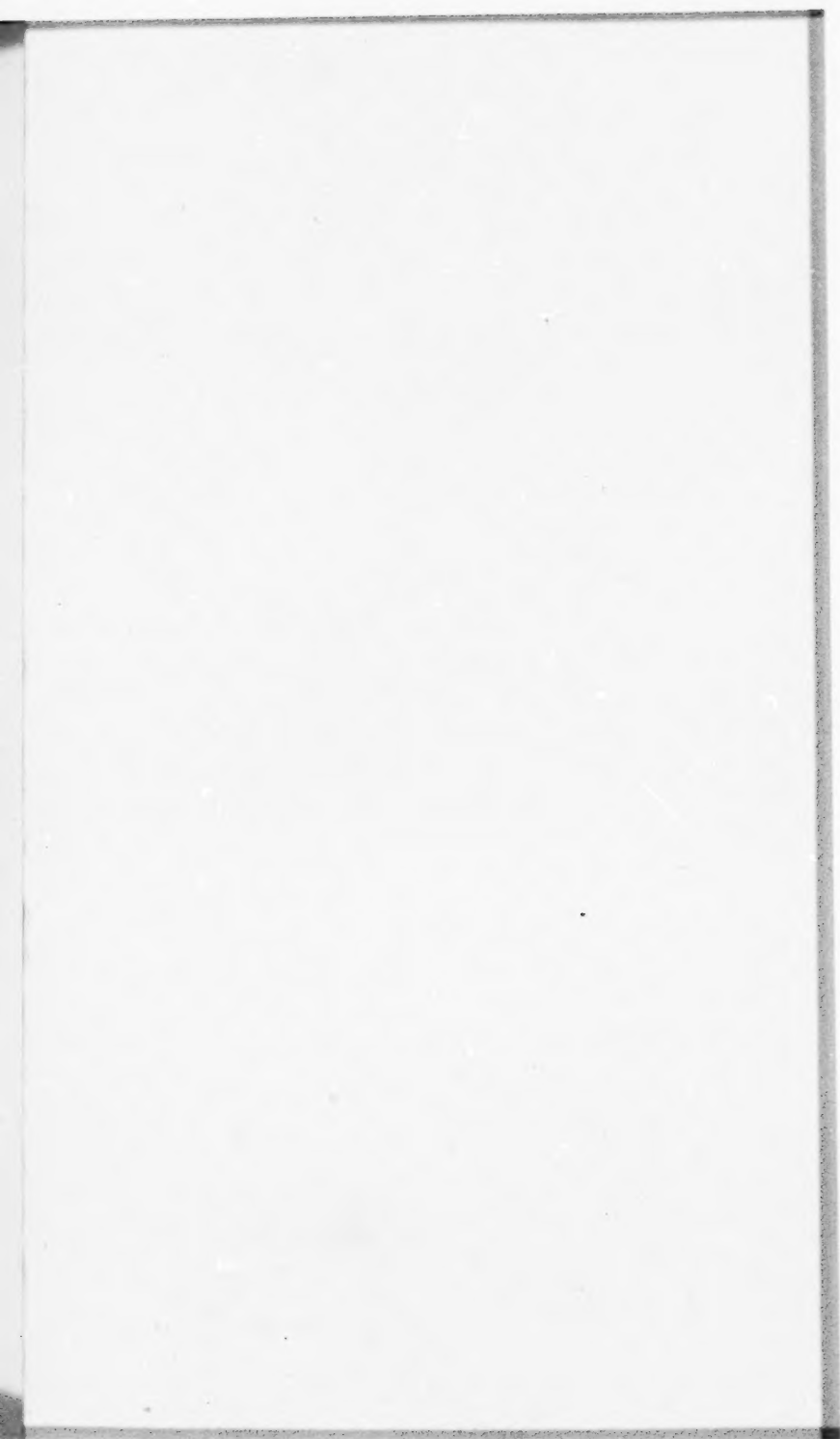
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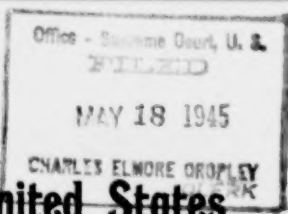
Of Counsel.

May 2, 1945.





22



IN THE
Supreme Court of the United States

WENDELL J. CALEY

defendant-petitioner

vs

RYAN DISTRIBUTING CORPORATION

plaintiff-respondent

No. 1161
October Term
1944

Petitioner's **REPLY** Brief
in support of his
Petition for Writ of Certiorari

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IN THE
Supreme Court of the United States

WENDELL J. CALEY

defendant-petitioner

VS

RYAN DISTRIBUTING CORPORATION

plaintiff-respondent

No. 1161
October Term
1944

Petitioner's REPLY Brief

Respondent's Brief (filed May 3, 1945) contains some misstatements which we here wish to correct.

Respondent's Brief is also based on misapprehensions of three points of law, which we here wish to point out.

Respondent's misstatements

In page 2 (line 1) and again on page 3 (line 20) of its Brief, respondent says "the jury found the patent valid and infringed". This is *not* quite a correct statement, because

the matter of "infringement" was *not* submitted to the jury at all, because respondent had confessed infringement (and therefore the question of "infringement" was no longer in issue), and

the *validity* of the patent, *broadly*, was *not* submitted to the jury;—*only* the single fact-question of invention over the *admittedly* and *adjudgedly* **non**-anticipatory prior-art was submitted to the jury (this having been the sole question remaining in the case).

Respondent is likewise in error when it says in (lines 5-10 of page 5 of) its Brief:

"Here Respondent fully rebutted the starting presumption of validity by *conclusive proof of the patent's invalidity, as shown by the prior art patents*¹, and Petitioner's starting presumption could not then be given weight as evidence in determining Petitioner's right to go to the jury";—

particularly, in labeling the grist of prior patents as "*conclusive proof of the patent's invalidity*" because respondent admitted, and the trial Judge ruled, and so instructed the jury (R. 37-38), that *none* of the prior patents disclosed the hair-curler construction of the patent-in-suit².

If the legal presumption of invention (flowing from the issuance of the patent-in-suit) has any real meaning at all, then prior patents which admittedly and adjudgedly do *not* disclose the same construction as that of the device of the patent-in-suit (and over which the Patent Office had determined the device of the patent-in-suit to be inventive) can-**not** alone constitute '*conclusive proof of the patent's invalidity*' on the fact-question of invention.

Respondent's first misapprehension of the law

Respondent's foregoing misstatement was apparently induced by respondent's recognition of the soundness of the point made in our Petition

(that *judgment non obstante veredicto* may **not** be entered or sustained in reliance upon the Anderton patent which the trial Judge had earlier ruled was "not anywhere near the patent" in suit and "a waste of time" to consider (R. 25-26) and as to which the trial Judge discouraged rebuttal because he thought Anderton was of no probative value),

1) all emphasis, and all parenthetical explanations, in quotations, are supplied by us, unless otherwise indicated.

2) "I think nobody disputes that this hair curler (of the patent-in-suit) is useful, nobody disputes that it is new in the sense that just that combination has not been made before . . ." (R. 37-38)

because in lines 16-18 of page 3 of respondent's Brief, respondent retreats to a reliance upon Figures 8 and 9 of the patent-in-suit (illustrating the "Prior-Art") *alone*, as the basis for its contention that the patent-in-suit is invalid;—respondent's Brief saying:

"the Caley patent alone, with its showing of an admittedly prior construction, is sufficient to establish its own invalidity".

However, *neither* the Patent Office, *nor* the trial Judge *nor* the Circuit Court of Appeals *ever* found that the "Prior-Art" illustrated by Figures 8 and 9 of the drawings of the patent-in-suit was, *in and of itself*, sufficient to negative invention. Indeed, the Patent Office granted the patent in the face of such "Prior-Art", and both the trial Judge and the Circuit Court of Appeals based their opinion of "non-invention" in reliance upon the Anderton patent on a metallic price-tag for tagging finger-rings in jewelry-stores which the trial Judge found was "not anywhere near the patent" in suit and "a waste of time" to consider.

This erroneous contention of respondent (at variance with the opinions of *all* the tribunals below), as well as respondent's further statement:

"Here *Respondent fully rebutted the* starting *presumption of validity* by conclusive proof of the patent's invalidity, as shown by the prior art patents, and Petitioner's starting presumption could not then be given weight as evidence in determining Petitioner's right to go to the jury" (page 5, lines 5 to 10 of respondent's Brief),

all point up respondent's first misapprehension of the law, namely as to what presumptions attach to a patent by virtue of its issuance.

Thus, as respondent's "prior art patents", which respondent has unwarrantedly labeled "*conclusive* proof of the patent's invalidity" are not any closer to the structure

of the patent-in-suit than is the "Prior-Art" exemplified by Figures 8 and 9 of the drawings of the patent-in-suit, therefore, if respondent's contention is correct as to the presumptions flowing from the issuance of a patent, then the net conclusion must inescapably follow, that there is **no** presumption of validity attaching to a patent at all. This would follow because if the admittedly and adjudgedly **non**-anticipatory prior-art considered by the Examiner and illustrated on the face of the patent-in-suit is (as respondent puts it) "*conclusive* proof of the patent's invalidity", then the presumption flowing from the issuance of the patent is that of **invalidity** and not of **validity**. Thus, the least that *any* defendant can do in *any* infringement suit is to introduce in evidence one or more of the prior patents cited by the Examiner in the "file-wrapper" of the patent-in-suit, and if these prior patents which had been considered by the Examiner can be "*conclusive* proof of the patent's invalidity" without *any* other oral or documentary evidence, even though the confessed infringer admits and the trial Judge rules that these prior patents do *not* disclose the same construction as that of the device of the patent-in-suit (and that the device of the patent-in-suit is both new and useful even in the light of all the prior patents), then, when coupled with respondent's second misapprehension of the law, hereinbelow pointed out, it would inescapably follow that not only is the presumption flowing from the issuance of the patent that of **invalidity** (instead of *validity*), but, indeed, such a presumption of **invalidity** would be *conclusive* upon the issuance of the patent.

Respondent's second misapprehension of the law

Respondent admits, and the lower Courts have both held, that there was a substantial body of evidence tending to support invention.

Respondent's Brief urges, however, and the lower Courts, in effect, held, that as long as the evidence tending to support the presence of invention is not "*conclusive*", it is no evidence at all.

Of course, there never has been and never will be any *conclusive* evidence of invention;—*in any suit*.

Therefore, it would seem inescapably to follow from respondent's Brief, that if the presumption of invention attaching to the issuance of a patent is so completely meaningless that the very "Prior-Art" illustrated on the face of the patent-in-suit, is alone sufficient not only to overcome the legal presumption of invention, but is also sufficient *conclusively* to evidence non-invention, *even though such "Prior-Art" admittedly and adjudgedly does not disclose the claimed invention of the patent-in-suit*, and if, coupled with that, all the heretofore recognized historic indicia of invention are to be given no weight merely because they do not *conclusively* establish invention, then it necessarily follows that no patent can ever be held valid on the primary fact-question of *invention*, on the basis of the heretofore recognized legal presumption of invention flowing from the issuance of the patent-in-suit and the concomitant burden of proof and on the basis of all the heretofore recognized evidences of invention, and that the validating of a patent *in respect to the fact-question of invention* will be relegated to the unchartable discretion of the trial Judge;—and such discretion then becomes superior to any question of the burden of proof or the probative value of evidence.

If the question of whether or not the fact-question of invention be permitted to go to a jury or whether the jury's fact-finding of invention be overridden (because the trial Judge wishes to decide such fact-question himself or because he disagrees with the jury's conclusion thereon), be left wholly to the discretion of the trial Judge *without any limitations or qualifications*, then the right to a jury-trial to determine the fact-questions (including the fact-question of invention) becomes hollow and meaningless.

The decisions as well as the rationale of the situation indicate a line of distinction. Thus, for instance, where a single prior patent or a single prior-art device, in and of itself, completely anticipates the patent-in-suit, namely,

shows the *same* construction as that of the patent-in-suit, and the identity of the device of such prior patent or prior-art on the one hand and the device of the patent-in-suit, on the other hand, is thus manifest from a mere visual comparison of the two, then the trial Judge may take the case away from the jury. The basis there, for taking the case from the jury, is that there is then no opportunity for any difference of opinion as to what the anticipating prior-art structure is.

That, however, is not the situation in the case at bar, because the trial Judge expressly ruled (and instructed the jury) that the construction of the device of the patent-in-suit is not disclosed in any prior patent or in any "prior-art", and that the device of the patent-in-suit is both *new* and useful (R. 37-38).

The line of distinction indicated by the decisions is to the effect, however, that where, as in the case at bar, the device of the patent-in-suit is not anticipated by any prior patent nor by any "prior-art" device, and the Court must *combine* two or more prior patents or "prior-art" devices in order to synthesize a hypothetical *composite* structure (having *no* actual existence in the "prior-art") in order to reach a conclusion of non-invention in respect to the device of the patent-in-suit, then there is no such identity or fixity of the "prior-art" as to leave no room for any difference of opinion, and then the question of invention is a fact-question reserved for the jury.

Unless the power of the trial Judge is restricted by some such limitation as this, the vaunted right of trial by jury of the fact-question of invention underlying all patent litigation becomes a mirage, and the litigant cannot ever have a trial by jury on this subject as a matter of Constitutional right but only as a matter of the grace of the Court.

The case at bar having been tried to a jury, and the jury having found, as a fact, that petitioner's admittedly *new* and useful hair-curler of the patent-in-suit *did* involve invention over the admittedly and adjudgedly **non**-anticipatory "prior-art", the lower Courts' decisions in the case

at bar, in entering and sustaining *judgment non obstante veredicto*, was clearly a violation of the Seventh Amendment to the Constitution of the United States and an unconstitutional interpretation of Rule 50 of the Rules of Civil Procedure for the District Courts of the United States.

Respondent's third misapprehension of the law

Thus, in the case at bar, the question is

not, as respondent's Brief seems to suggest, **whether** in the opinion of the trial Judge (or in the opinion of the Circuit Court of Appeals) the admittedly *new* and useful hair-curler construction of the patent-in-suit involved invention over the admittedly **non**-anticipatory prior patents, **or whether** judicial opinion of non-invention could be sustained if this were a case tried by a Judge without a jury,

but whether the legal presumption of invention coupled with the six branches of evidence tending to support invention³ and coupled with the complete absence of any relevant evidence against invention not already considered by the Patent Office, entitled petitioner to the benefit of the jury's fact-finding of invention, *in an action tried to a jury*, in view of the guarantees of the Seventh Amendment to the Constitution and in view of Rule 50 of the Rules of Civil Procedure for the District Courts of the United States,

and whether *judgment non obstante veredicto* may be entered or sustained in reliance upon a piece of evidence⁴ which, throughout the trial, the trial Judge regarded of so little probative value as to say that it was "a waste of time" to consider it and the rebuttal of which he discouraged because

³) see part II of *Table of Contents* of respondent's Brief

⁴) the Anderton patent

of his conclusion, throughout the trial, that such piece of evidence ⁴ had no appreciable probative value,

and whether the fact that the trial Judge differed with himself ⁵ as to the probative value of the Anderton patent, doesn't, *ipso facto*, prove that reasonable men could differ as to the conclusions to draw from the Anderton patent.

Respectfully submitted,

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- 5) i. e. the trial Judge's conclusion (during the trial) that Anderton was "not anywhere near the patent" in suit and was "a waste of time" to consider (R. 25-26), and the trial Judge's conclusion (40 days after the trial) that Anderton established non-invention in the patent-in-suit (see fifth line from bottom of R. 44, and the reference to the same Anderton patent in the last paragraph on R. 46)

